

Award No. 7112

Docket No. CL-7203

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

John Day Larkin, Referee

PARTIES TO DISPUTE:

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

**GULF COAST LINES; INTERNATIONAL-GREAT NORTHERN
RR. CO.; THE ST. LOUIS, BROWNSVILLE & MEXICO RY. CO.;
THE BEAUMONT, SOUR LAKE & WESTERN RY. CO.; SAN
ANTONIO, UVALDE & GULF RR. CO.; THE ORANGE &
NORTHWESTERN RR. CO.; IBERIA, ST. MARY & EASTERN
RR. CO.; SAN BENITO & RIO GRANDE VALLEY RY. CO.;
NEW ORLEANS, TEXAS & MEXICO RY. CO.; NEW IBERIA
& NORTHERN RR. CO.; SAN ANTONIO SOUTHERN RY. CO.;
HOUSTON & BRAZOS VALLEY RY. CO.; HOUSTON NORTH
SHORE RY. CO.; ASHERTON & GULF RY. CO.; RIO GRANDE
CITY RY. CO.; ASPHALT BELT RY. CO.; SUGARLAND RY. CO.**

(Guy A. Thompson, Trustee)

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

(a) The Carrier is violating the Clerks' Agreement at San Antonio, Texas, by failing and refusing to pay certain warehouse employees at the rate of time and one-half for services performed on Sundays. Also

(b) Claim that such employees be paid the difference between straight time and time and one-half for each Sunday, retroactive to August 1953.

EMPLOYEES' STATEMENT OF FACTS: The warehouse operation in question is a regular five day operation, working Monday through Friday.

There is no work performed on Saturdays.

On each Sunday a reduced force is worked in this warehouse. Some of the employees who are worked on Sundays are regularly assigned Monday through Friday and they are paid time and one-half.

Other employees are extra or unassigned employees who have not been worked on more than five (5) days, or in excess of forty (40) hours, in the work week. These employees are paid only straight time for the Sunday work.

Attention is also directed to Award No. 5798 which also denied a claim for punitive rate to an unassigned employee performing work on Sunday. In denying that claim your Board, in support of the denial, cited rules reading exactly the same as our Rule 37 (c-2) and (c-3), supra.

Award 6018 covers a case where a furloughed employee was used to perform service at a warehouse on Sunday, was paid at the straight-time rate and the Clerks' Organization contended he should be paid at the time and one-half rate. Your Board denied that claim, stating there was no violation of the agreement in paying the employee so used at the straight-time rate.

Awards 6601, 5798 and 6018, supra, very definitely support the position of the Carrier in the instant case. A similar award here is, therefore, justified, since it has been clearly shown that the claim is not supported by any applicable rules of the agreement.

The substance of matters contained herein has been the subject of discussion in conference and/or correspondence between the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: This is a claim for certain unnamed extra men at the rate of time and one-half for each Sunday worked by them as warehouse employees at Carrier's San Antonio, Texas, property.

The warehouse in question is generally operated on a five days per week, Monday through Friday, basis. Normally there are a foreman, a transfer clerk and certain truckers and breakouts, all having Saturday and Sunday rest days. There is no operation at this warehouse on Saturdays. However, in order to accommodate certain patrons and to avoid delays to much-needed equipment, the Carrier, on or about August 1, 1953, started operating the warehouse on Sundays. Since that time, with a few exceptions, the warehouse has been functioning on Sundays, with some regular employees who are paid at time and one-half rate, and with some 10 to 15 extra employees whose seniority is not sufficient to warrant regular assignment. Where the latter have not previously worked a full 40 hours during the week, they are paid at the pro rata rate. This claim is that the unnamed extra employees are entitled to the penalty rate, a minimum of 8 hours pay at time and one-half for each Sunday assignment worked since August 1, 1953.

Rule 37 (c-6) provides that,

"Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee."

In using extra men primarily to perform this Sunday work, and regular employees where extra men were not available, Carrier has complied with Rule 37 (c-6).

Rule 47 (a) deals with Sunday work in the following language:

"(a) **Sunday Work.** Existing provisions that punitive rates will be paid for Sunday as such are eliminated. The elimination of such provisions does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the other hand, a rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required. **Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account.** This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be

assigned on Sunday. The intent is to recognize that the number of people on necessary Sunday work may change." (Emphasis supplied.)

The Organization contends that, since this Sunday warehouse work was not in operation prior to September 1, 1949, the Carrier must now pay at the rate of time and one-half for all of it. The first sentence of Rule 47 (a) makes clear that punitive rates for Sunday work "as such are eliminated." And this entire paragraph (a) of Rule 47 makes clear that changed circumstances are inevitable and must be recognized. Under no circumstance is the status quo ante to be congealed. "Changes in amount or nature of traffic or business * * * must be taken into account."

Nor do we think that the Carrier has reinstated work on Sunday which can be dispensed with, as that language is used in Rule 47. There is no evidence that Carrier has made this change in any spirit of evasion of the regular 40-hour week provisions. It has only acted to meet a competitive situation, for which allowance is provided in Rule 47.

The Organization contends that, while work on unassigned days shall be given to extra or unassigned employees "who will otherwise not have forty (40) hours of work that week * * *," (Rule 37 (c-6)), this does not say how such employees shall be paid. To determine the rate of pay, the Organization claims that we must look to the "Call" rule, which, it contends, applies to all employees notified or called to work on Sunday—i.e., whether regularly assigned employees, extra employees, or unassigned employees, all are to be paid the punitive rate if notified that Sunday work is available.

"Rule 43. Notified or Called.

"Except as provided in Paragraph (b) of this rule, employees notified or called to perform work not continuous with, before or after the regular work period, or on Sundays and specified holidays, shall be allowed a minimum of three (3) hours for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on a minute basis.

"(b) Employees who are called regularly on Sundays and specified holidays shall be allowed a minimum of eight (8) hours at time and one-half rate."

Since these extra employees have been called to Sunday work, it is claimed that they, as well as the regular employees, must be paid the time and one-half rate. Attention is called to two recent decisions of this Board in which we interpreted and applied Rule 43. In Award 7084 we sustained a claim of a regular employee regularly called for extra work on one of his rest days. And again in Award 7117, we sustained the claim of a regular employee regularly assigned to work five or more hours on one of his rest days. In both instances we applied the language of the final sentence of Rule 43 and awarded a minimum of eight hours' pay at the time and one-half rate as required for such employees regularly assigned.

But the instant case is to be distinguished from those just cited. In the case now before us there is no issue regarding the pay for regularly assigned employees called to perform this Sunday work. They are paid the punitive rate. But we are now asked to apply the same rate to extra employees who have not worked the full forty hours during the week. This is, in effect, a request that we return to the principle of applying the punitive rate to all Sunday and holiday work, except where there are staggered schedules.

We do not believe that it has been the intent and purpose of those responsible for promulgating the 40 hour week regulations to have the punitive rates apply to extra men who have not worked a minimum of eight hours per day for five consecutive days. Such extra men may claim the higher rate

when their work exceeds eight hours in one day. They may also claim the punitive rate when required to work in excess of forty hours per week. But they are not entitled to claim the rate simply because they are assigned to Sunday work. Sunday work as such no longer commands the punitive rate, except where it is a regularly assigned rest day.

Rule 43 was obviously intended to apply to regular employees who have historically had Sundays and holidays off. It was not meant to provide the time and one-half rate to an extra employee who has worked less than a regular assignment. To apply the rule as we are being asked to apply it in this case, extra men would be getting time and one-half pay where they have not worked a full forty hours; and this would place them in a favored position to which the parties obviously did not intend to elevate them.

We are convinced that sustaining this claim would create more of a problem than it would solve. It must be denied.

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 the Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 23rd day of September, 1955.