

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

D. E. La Belle, Referee

PARTIES TO DISPUTE:

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

SOUTHERN RAILWAY COMPANY

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

(a) The Carrier violated the Agreement when, in the office of Auditor Freight Accounts, Atlanta, Georgia, it excused employees for a part of a day to attend funerals of fellow employees, or close relatives of fellow employees, and failed to pay the employees so excused a full day's work of eight hours.

(b) Clerk C. R. Buchanan and the forty-one other employees named in Employees' Exhibit "B" shall now be compensated the difference between what they were paid and proper pay for a full day of eight hours.

EMPLOYEES' STATEMENT OF FACTS:

1. In 1928, certain of the Accounting and General Offices of the Carrier were removed from Washington, D. C., to Atlanta, Georgia. In 1933, other like offices of the Carrier were moved from Cincinnati, Ohio, to Atlanta and consolidated with the offices moved from Washington in 1928. Both in Washington and Cincinnati, and in Atlanta after 1928, there was a consistent practice of excusing employees from duty for sufficient time to attend funeral services for fellow employees and their close relatives, paying such employees so excused a full day's pay of eight hours.

2. There was also a former practice of compensating employees for time lost serving on juries and arranging for and attending funerals of the employees' immediate family. This practice was unilaterally discontinued by the Carrier in 1949. Claims were filed by the Employees and agreement reached restoring the practice on September 29, 1950. A copy of the Agreement is attached hereto and identified as Employees' Exhibit "A".

3. Claim was filed under date of October 24, 1956, because of Mr. C. R. Buchanan and forty-one (41) other named Clerks having been excused to

OPINION OF BOARD: This is a claim of one C. R. Buchanan and forty-one other employes of the Carrier, all employed in the Rate Department of the Office of Auditor of Freight Accounts at Atlanta, Georgia, to be paid the amounts deducted from their respective pay checks for time lost in attending funerals.

Organization maintains that the following rules, or portions thereof, support its position:

"Rule 3—Effective Date (Revised, effective October 1, 1938)

This agreement becomes effective October 1, 1938, and supersedes and cancels all former agreements but does not, unless rules are specifically changed, alter practices or working conditions established by or under former agreements."

* * * * *

"Rule 24—Basic Day, Hours of Service and Meal Period (Revised, effective October 1, 1938)

(a) Except as otherwise provided in this agreement, eight (8) consecutive hours, exclusive of meal period, shall constitute a day's work."

* * * * *

"Rule 45—Basis of Pay and Maintenance of Earnings (Revised, effective September 1, 1949)

(a) Employees embraced in Groups 1, 2, 3 and 4 of Rule 1 shall be paid on a daily basis and employees embraced in Group 5 of Rule 1 shall be paid on an hourly basis."

* * * * *

"Rule 46—Preservation of Rates and Employment

(f) (1) (Revised, effective September 1, 1949) Nothing herein shall be construed to permit the reduction of days for regularly assigned employees (not positions) included in Groups 1, 2, 3 and 4 of Rule 1 and Group 5 employees referred to in paragraphs (1), (4), (5), and (6) of Rule 5 of this agreement below five (5) per week, except that this number may be reduced in a week in which holidays specified in Rule 32 occur within the five days constituting the work week by the number of such holidays.

NOTE: Exception to this rule may be made by mutual agreement between General Chairman and Management.

(2) Nothing in this Rule 46 shall affect or prevent the abolishment of positions at any time."

It is the contention of Organization that there has been a past practice, of at least twenty-eight years standing, to allow fellow employes within the immediate offices of the Rate Department of the Auditor of Freight Accounts' office, time off to attend funeral services of deceased wives, husbands, Fathers and Mothers of fellow employes within the immediate offices

of said Rate Department. That there have been four negotiated Agreements between the parties, since the National Agreement was entered into, viz: 1921, 1924, 1926 and the present Agreement, effective October 1, 1938, and Organization contends that in none of these Agreements, was there any change in the existing practice claimed. Organization contends that by reason thereof, the custom and practice herein set forth, has not been changed and that Carrier is bound thereby, by the provisions of Rule 3, herein quoted.

Organization claims that failure of Carrier to pay the particular claimants a full day's pay the particular days, for which Carrier made deductions, is a violation of Rule 24(a), providing for an eight hour day, exclusive of meal period, constituting a day's work and Rule 46(f) which provides that nothing in the Agreement shall be construed to permit the reduction of "days" below five per week (with the exception as to designated holidays). That since a day is eight consecutive hours (Rule 24(a)) and since the individual claimants occupied "daily rated" positions (Rule 45(a)) they are entitled to a full day's pay (the daily rate) for each day they protected their positions.

Carrier denied these claims and denied that there has been a practice for many years of excusing employes to attend funerals involving families of members of the Rate Department: Carrier maintains that the excusing of its employes without deduction of pay, is a privilege extended by the Management, not covered by the Agreement, and it is a matter strictly for Management Control. That it has upon occasions made pay roll deductions while on other occasions it has exercised its prerogative and made no charge for the time. That this has been its practice for years. As the individual occasions arise, consideration is given to the circumstances and conditions, and that its action is decided upon at that time.

That the Rate Department of the office of Auditor of Freight Accounts at Atlanta, Georgia, has a regular force of approximately one hundred employes and that it consists of four separate sections, each under the jurisdiction of Chief Clerk. That it has in the past, and did on one of the occasions involved here, excuse and pay thirteen employes of the particular section wherein the bereaved employe was employed: that 36 other employes in the Rate Department generally were excused, but not paid.

That the policy of the Carrier has been to excuse and pay employes to attend funerals but such has been confined to the Head Clerk's jurisdiction where the bereaved employe was assigned: that the only exception to that policy being where the employe of another section might act as a pallbearer in another section or be a close or devoted friend to an employe in another section.

Carrier has also raised the question of a Memorandum Agreement between the parties entered into Section 29, 1950, effective October 1, 1950, wherein, among other things, contained the following:

"Section 2—Death in Immediate Family—(a) When the assignment of an employee embraced in Group 1 or Group 2 is not filled during his absence from work on an assigned work day making necessary funeral arrangements for or attending funeral of member of his immediate family, no deduction for time so absent by such employee will be made to the extent and for the number of days hereinafter specified, until he has so lost either a fraction of a

work day, or one (1), two (2) or three (3) work days as the case may be, depending on the circumstances in each case.

(b) Time absent from his assignment by a Group 1 or Group 2 employee making necessary funeral arrangements for or attending funeral of member of his immediate family shall in all cases be kept to a minimum. As circumstances are to govern in each such case it is intended that such an employee be absent from work under this agreement such time as essentially necessary, not to exceed three (3) work days, but it is not intended that such absence be the maximum of three (3) days in all cases. The intent is to recognize that an employee may make necessary funeral arrangements for or attend funeral of member of his immediate family without being absent from his assignment; that in some situations he may be so absent but a few hours, and that it may be necessary for him to be so absent one (1) work day in some situations, two (2) work days in certain situations or three (3) work days in certain other situations.

In situations where funeral is to be held in city or town other than city in which employee is regularly assigned, management may, at its discretion, grant an extension of the three (3) work day period above specified but in doing so no precedent shall be established."

Carrier, in this respect, contends that the claim goes beyond the provisions of said Section 2 and that the claim is without merit.

On this particular phase of the instant case, there can be no question but said Section 2 was an Agreement between the parties to settle an outstanding controversy existing between the parties prior to execution of the September 29, 1950 Agreement. Standing alone, without any evidence of any further custom or practice following the effective date of this Agreement, might lead to a conclusion that such Agreement terminated all practices existing prior thereto relative to any employees being excused and paid for time spent in attending funerals.

Here we have a case where Carrier admittedly excused and paid, in some instances, employees attending funerals of certain close relatives of fellow employees. Our problem is to decide what the practice was.

Organization stoutly contends that the custom or practice was to excuse and pay all employees of the Rate Section of the Auditor of Freight Accounts at Atlanta, Georgia, upon request.

Carrier denies that such a practice existed, that it did on occasions excuse and pay certain employees who were working in the same section under the jurisdiction of the Head Clerk where the bereaved employee was employed; that the only exceptions thereto was in instances where an employee in a different section, happened to be the dearest and closest friend of the bereaved employee, even though the latter was not in the same section; or under the jurisdiction of the same Head Clerk, or where an employee of another section, might act as a pallbearer, Carrier contends that the excusing and paying employees, under the circumstances set forth herein was a privilege extended by the Management.

This matter is hopelessly involved, with Organization vigorously maintaining its position is the correct one and Carrier maintaining just as vigorously that its position is the correct one.

There has been little, if any concrete evidence, submitted on the property, upon which we can make a determination of the facts. The claim as filed, must be supported by fact. On the theory that the one affirmatively charging a violation is the moving party, and therefore, should be in possession of the essential facts to support the charge before making it, this Division of the Board is committed to the so-called "burden of proof" doctrine. On this theory, we hold that Organization has not borne the burden of proof and the claim 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 was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 31st day of May 1962.