



Award No. 18298
Docket No. CL-18528

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

David Dolnick, Referee

PARTIES TO DISPUTE:

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

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-6731) that:

1. Carrier violated the rules of the current Clerks' Agreement, which became effective July 1, 1963, when it compensated H. O. Shirley, Night Baggage man, Jamestown, North Dakota, two hours at time and one-half rate for work performed on Saturdays and Sundays, commencing with July 6, 1968.

2. Carrier shall now be required to compensate H. O. Shirley and his successors, if any, an additional six hours at time and one-half rate each Saturday and Sunday, commencing with July 6, 1968.

EMPLOYES' STATEMENT OF FACTS: Immediately prior to July 1, 1968, the following positions were maintained at Jamestown, North Dakota:

Day Baggage man—	Sunday through Thursday—11:00 A. M. to 7:00 P. M.
Night Baggage man—	Tuesday through Saturday—12:01 A. M. to 8:00 A. M.
Relief Baggage man—	Thursday, Caller—8:00 A. M. to 4:00 P. M.
	Friday, Day Baggage man—11:00 A. M. to 7:00 P. M.
	Saturday, Day Baggage man—11:00 A. M. to 7:00 P. M.
	Sunday, Night Baggage man—12:01 A. M. to 8:00 A. M.
	Monday, Night Baggage man—12:01 A. M. to 8:00 A. M.

The duties assigned to the position of Day Baggage man and Night Baggage man extend over a period of seven days per week. These positions were filled eight hours per day, seven days per week, prior to July 1, 1968.

The position of Night Baggage man is assigned to perform the work of handling mail and baggage to and from Trains Nos. 25 and 26, receiving and delivering baggage from and to patrons and preparing reports incident thereto and janitorial work.

Enclosed as Carrier's Exhibit A are copies of all correspondence concerning the handling of this claim on the property.

(Exhibits not reproduced.)

OPINION OF BOARD: Effective July 1, 1968 Carrier abolished the positions of Day Baggage man and Relief Baggage man. Claimant occupied the Night Baggage man position with hours from Midnight to 8:00 A.M. and with rest days on Saturday and Sunday. Since July 6, 1968, Claimant has been called each and every Saturday and Sunday to handle mail and baggage on Trains Nos. 25 and 26 and to perform janitorial work. This is the same type of work he performs on his regularly scheduled days Monday through Friday. Work on Saturday and Sunday was performed prior to July 6, 1968 by employees whose positions were abolished.

Employees contend that the Claimant is entitled to eight (8) hours' work or pay at time and one-half rate for each of the rest days when he was called and worked. Since he was paid two (2) hours at the time and one-half rate, he is entitled to an additional six hours at the premium rate for each of the rest days when called and worked. In support thereof Employees cite Rules 28 (Day's Work), 29 (Work Week), 29(j) (Work On Unassigned Days), 31(b) and (c) (Overtime), 33(b) (Sunday and Holiday Work) and 35 (Notified and Called). Rules 29(j), 33 and 35 are particularly relevant. They read as follows:

"RULE 29.

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

"RULE 33.

(b) Except as otherwise provided in this Section (b) of Rule 33, service rendered by an employee on his assigned rest day or days other than Sunday will be paid for under Rule 35.

Except as otherwise provided in this Section (b) of Rule 33, service rendered by an employee on Sunday when that day is one of his assigned rest days will be paid for under Rule 35.

Service rendered by an employee on his assigned rest day or days filling an assignment which is required to be worked or paid eight hours on such day will be paid for at time and one-half rate with a minimum of eight hours."

"RULE 35.

Except as provided in Rule 32, 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 hours' work or less and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis."

Carrier argues (1) that the position of Night Baggage man is a five (5) day and not a seven (7) day position, (2) that Saturdays and Sundays are Claimant's rest days, and (3) that Rule 33 (b) is not applicable because it specifically "provides that service on rest days Saturday and Sunday . . . will be paid under the Call Rule — Rule 35 and that is what Carrier did in the instant case."

It is apparent from all of the evidence in the record that the Carrier relies on the Call Rule (Rule 35) as a subterfuge to evade the undisputed fact that the work of the Night Baggage man position is a regularly recurring seven (7) day position and not a five (5) day position. Work on Saturdays and Sundays is performed regularly and not occasionally. Rule 35, when read and applied with other rules of the Agreement, does not apply when work on rest days occurs regularly. In Award No. 14899 we said: "Carrier is not entitled to have work performed on a regularly recurring basis on the incumbent's rest days, because work accruing to that position continues to exist six days a week." The findings and conclusions reached in said Award No. 14899 were followed and affirmed in Award No. 15462. See also Award No. 8533.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 violated.

AWARD

Claim sustained.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 20th day of November 1970.

CARRIER MEMBERS' DISSENT TO AWARD 18298, DOCKET NO. CL-18528

This Award is erroneous for the reason that the rules of the agreement do not support the claim of the Employees. There is no restriction in the

contract to applying Rules 33(b) and 35 to regular calls on an employee's assigned rest days.

Prior to the adoption of the 40 Hour Week Agreement there was no valid showing in the record in the instant case by the employees that Carrier was prohibited from doing what it did in the instant case so there should be no prohibition now.

The Awards cited by the Referee, 14899, 15462 and 8533, involved agreement rules and practices different from those on the Carrier involved in this case, and should not have been followed.

Rule 33(b) of the applicable agreement clearly gave Carrier the contract right to use an employee who works a five day position on his rest days (unassigned days) and compensate him per the provisions of Rule 35 (Call Rule) and, further, Rule 33(b) makes no mention relative to whether the use of this employee on his rest days is on a regularly recurring or irregular basis, and we are of the opinion that the majority completely misinterpreted the appropriate contract rules in this case; therefore, this award is of no value relative to precedent .

The conclusion of the Referee that "Rule 35 when read and applied with other rules of the Agreement does not apply when work on rest days occurs regularly" is dictum.

For the foregoing reasons we dissent.

W. B. Jones
P. C. Carter
G. L. Naylor
G. C. White
R. E. Black