

Award No. 4860
Docket No. 4788
2-CMS:P&P-CM-'66

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Levi M. Hall when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 76, RAILWAY EMPLOYES'
DEPARTMENT, AFL-CIO (Carmen)**

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
RAILROAD COMPANY**

DISPUTE: CLAIM OF EMPLOYES:

1. That Carmen W. Mickle, M. Burdick, H. Ois and K. Beck were improperly changed from a work week of Tuesday through Saturday, rest days Sunday and Monday, to newly created assignments of work week Wednesday through Sunday, effective at close of business, May 18, 1963 in violation of agreement rules.

2. That accordingly the Carrier be order to:

(a) Restore these men to their former assignments, work week of Tuesday through Saturday, rest days Sunday and Monday.

(b) Additionally compensate these men at the straight time rate of pay for having been deprived of their right to work each Tuesday, retroactive to May 18, 1963 and continued until practice was discontinued.

EMPLOYEES' STATEMENT OF FACTS: Carmen W. Mickle, M. Burdick, H. Ois and K. Beck, hereinafter referred to as the claimants, were regularly employed by the Chicago, Milwaukee, St. Paul and Pacific Railroad Co., hereinafter referred to as the carrier. The claimants were employed and had a regular assignment, prior to May 18, 1963, of Tuesday through Saturday, with rest days of Sunday and Monday, starting time 7:30 A.M. to 4:00 P.M., on carrier's repair track at St. Paul, Minnesota.

On May 7, 1963, notice #11 was posted, abolishing twelve (12) carmen positions on the St. Paul repair track with rest days Sunday and Monday, effective with close of shift, Saturday, May 18, 1963 at 4:00 P.M. Also on notice #11 was a list of new positions, for which applications would be received, with various days of rest, which would be filled as of close of shift, Saturday, May 18, 1963.

penalties upon the occurrence of specified contingencies; but, the contract now before us contains no such provision.

Having determined that the National Railroad Adjustment Board may not impose a penalty, unless expressly provided for in a collective bargaining contract, we now come to analyzing Petitioner's prayer for a monetary Award as set forth in Parts (2) and (3) of its Claim. These Parts set forth a formula for computing a monetary Award without regard to actual net losses, if any there be. The fulcrum is resolution of the issue as to whether such an Award would be a penalty.

In contract law a party claiming violation of a contract and seeking damages must prove: (1) the violation; and (2) the amount of the damages incurred. A finding of a violation does not of itself entitle an aggrieved party to monetary damages.

In the instant case Petitioner has proven the violation. It has not met its burden of proving monetary damages. There is no evidence in the record that any Employee in the MW collective bargaining unit suffered any loss of pay because of Carrier's violation of the contract. The inference from the record, if any can be drawn, is that the M.W. Employees were steadily employed by Carrier during the period of the project. Therefore, for this Board to make an Award as prayed for in Parts (2) and (3) of the Claim would be imposing a penalty on the Carrier and giving the MW Employees a windfall-neither of such results is provided for or contemplated by the terms of the contract. To make such an Award, we find, would be beyond the jurisdiction of this Board."

THIRD DIVISION AWARD NO. 11089

"However, no claim is made by or on behalf of such employee. The Claimants here were fully employed and compensated for their time. Furthermore, we can find nothing in the record to prove the basis for the claim of '33 hours each at punitive rate of the Station Accountant'. There being nothing in the record to support the item (c) as stated in the claim, the board has no recourse but to deny this item."

THIRD DIVISION AWARD NO. 11135

"Part 2 of the claim falls for lack of evidence. It is apparent from the record that Claimant suffered no monetary loss."

The carrier submits that it is readily apparent that by the claim which they have presented the employees are attempting to secure through the medium of a Board Award in the instant case something which they do not have under the rules and in this regard we would point out that it has been conclusively held that your Board is not empowered to write new rules or to write new provisions into existing rules.

It is the carrier's position that there is absolutely no basis for the instant claim as it is in no way supported by past practice, schedule rules or agreements and we respectfully request, therefore, that the claim be denied.

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Carmen Claimants were regularly employed by Carrier and had a regular assignment on a six day operation prior to May 18, 1963, of Tuesday through Saturday with rest days of Sunday and Monday, on Carrier's repair track at St. Paul, Minnesota. On May 7, 1963, notice was posted abolishing twelve (12) carmen positions on the St. Paul repair track with rest days Sunday and Monday, effective with the close of shift, Saturday, May 18, 1963. On May 18, 1963 notice was posted assigning Claimants as Carmen to the repair track with rest days Monday and Tuesday.

It is contended by Claimants that Carrier violated the provisions of the current Agreement when it created a seven day operation on the St. Paul repair track and assigned other than Saturday-Sunday or Sunday-Monday as rest days, without showing that Sunday work was necessary or could not be dispensed with; that there had not been any Sunday work on the St. Paul repair track prior to May 18, 1963.

It further appears from the record that the Local Chairman addressed a letter to the Car Foreman in which he outlined the Claim which is the basis of the instant dispute and, thereafter, Carrier restored Claimants to their former positions on June 13, 1963, and resumed the six day operation.

It is Carrier's position that, in accordance with past practice at other stations on Carrier's property, in order to reduce the delay in the repair of bad order cars and in order to have repair facilities for such cars and foreign cars for the accommodation of Shippers, the Carrier, effective May 18, 1963, inaugurated a seven day repair track operation at St. Paul; that when a continuing claim was presented to the Carrier, it reverted to a six day repair track operation although it hindered Carrier's operation.

Rule 2(j) of the current Agreement between the parties reads, as follows:

"(j) 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."

As indicated in Award 3094 (Ferguson)—"The word 'necessary' is the key to the present dispute. If a repair track crew was necessary on Sunday, the

Carrier was within its rights in establishing it. The reverse of the proposition is equally true."

We are limited in this controversy to the time commencing May 18, 1963, and ending on June 13, 1963, in a determination as to whether Sunday work was necessary.

It is significant that there had never been any repair track work performed on Sunday at St. Paul prior to May 18, 1963. After the initiation of this claim on the property to the Car Foreman, in the denial of the same the only statement that appears in the record is, as follows; "I feel this claim is uncalled for in view of the fact that at the request of your organization the seven day operation was reinstated to a six day operation." The District General Car Foreman endorsed this statement of the Car Foreman in his denial. So far as the record discloses nothing was said in either of these denials with reference to the necessity for Sunday work. Our conclusion is that at the time heretofore indicated in these Findings the amount or nature of the traffic, business or work has not been shown to have been sufficient to constitute—"Sunday work that may be necessary." This is substantiated, partially at least, by Carrier's reversion to a six day week on June 13, 1963 less than a month after the initiation by the Carrier of a seven day work week.

However, in the denial of the highest designated officer there was some indication that there were substantial changes on the property at St. Paul, Minnesota, around the first day of January, 1964, which if substantiated might have necessitated the establishment of a seven day work week on the repair track. The action of the Carrier in May 1963 may have been premature. Consequently, these findings are not to be construed as prohibiting the Carrier from establishing seven day positions if these changes are of such amount or nature as to justify the establishment of Sunday repair track work if necessary within the meaning and intent of Rule 2(j) of the current Agreement.

The facts presented in the instant case are similar in some respects to those appearing in Award 3094 and the issues are practically identical. The Board sees no reason for diverting from the conclusion arrived at in that Award.

AWARD

Claim 1 Sustained.

Claim 2 (a) Claim dismissed
(b) Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 13th day of April, 1966.

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