Award Number 219
Docket Number SG–227

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

DISPUTE.—

> "Claim of P. S. Oakeshott and 41 other signal department employees of the Western Division, for compensation lost during the month of December 1934, account their working time being reduced by the railway management from five days per week to three days per week."

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

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

The parties to said dispute were given due notice of hearing thereon.

This dispute being deadlocked, Lloyd K. Garrison was called in as Referee to sit with the Division as a member thereof.

There is in evidence an agreement between the parties effective March 1, 1926.

Prior to 1930, with perhaps occasional minor fluctuations, the signalmen in question worked six days a week. During the next four years a number of the men were laid off and others had their working days reduced, some to five, some to four, and the majority to three. On February 1, 1934, until on or about December 4, 1934, the men were all restored to a five day week. The petitioners claim that the restoration was brought about as a result of an agreement by the carrier to establish and maintain a five day week, and that this agreement was broken on or about December 4, 1934, from which date until the end of that month the men involved in the present claim went on a three day week. The five day week was again restored in January 1935, and has apparently been substantially maintained since then.

The petitioners base their claim of an agreement on a letter to the General Chairman from W. M. Jaekle, Engineer of Maintenance of Way and Structures. The letter is dated January 12, 1934, and reads as follows:

> "Referring to your letter of January 9th and our recent conversation about working signalmen five days per week. We expect to put this into effect not later than February 1st."

It is conceded that the original agreement between the parties effective March 1, 1926, and still in force, contains no guarantee of any particular number of working days per week. It is asserted, however, that the Jaekle letter constituted a modification of that agreement and guaranteed a five day week. Notwithstanding the carrier's position, the evidence satisfies us that Jaekle had authority to bind the carrier to such an understanding if such an understanding can be extracted from the letter; and it can make no difference that the General Chairman failed to give 30 days notice of the desired change under Section 6 of the Railway Labor Act, because if Jaekle's letter constituted a binding agreement, it also constituted a waiver of any insistence on a 30 day notice.

Giving to the words in Jaekle's letter their ordinary, everyday meaning, they do not speak the language of an agreement but indicate merely an intention on the part of the carrier to do something which the carrier was not bound to do. The reference to a "recent conversation" does not help matters, for there is no evidence that that conversation amounted to an agreement to guarantee a five day week. If, in that conversation, such an agreement had been reached, it would have no binding effect unless a written memorandum of it were made, and the letter cannot be said to constitute such a memorandum, because it does not describe any agreement, does not refer to any agreement, and merely states that the carrier expects to put into effect a five day week. The letter contains no guarantee or promise that if the five day week were restored as expected, the carrier would be bound to maintain it for any length of time. We are not at liberty to add such a guarantee or promise to the letter unless from other evidence it can clearly be said to be implied.

The evidence lends no support to any such implication, but on the contrary indicates that a guarantee was neither thought of nor discussed. Thus the correspondence antedating the Jaekle letter, which stretches back to September 1933, consists in substance of repeated requests by the General Chairman that the men be given more work in view of their small earnings and the difficulty of properly attending to their apparatus and equipment, and of replies by the carrier that the conditions would not permit any work increase. In all of this correspondence leading up to the Jaekle letter there is not a word about establishing a guaranteed work-week. Moreover, there were put in evidence four agreements between the parties modifying or supplementing the main agreement of March 1, 1926, and each of these (they are dated June 11, 1931, August 31, 1932, December 17, 1934, and March 6, 1935) were expressed in clear and definite language with sufficient detail to show what was meant to be accomplished; and each (except the one of December 17, 1934, which was evidenced by an exchange of letters) was in the form of a bilateral agreement signed by both parties. No particular formality is necessary to the making of a contract. But from the course of dealing between the parties it would be surprising to find such an important matter as a five day week guarantee—more important than any of the other matters covered in the four agreements just mentioned—expressed in such a casual and indefinite form as Jaekle's letter, which in fact makes no reference whatever to any promise or guarantee.

There is no indication from the subsequent actions of the parties that they supposed any such guarantee or promise to have been contained by implication in the Jaekle letter. For example, on January 31, 1935, only a month after the reduction of work complained of, the General Chairman wrote to the carrier as follows:

> "The employees of the signal department are very desirous of avoiding fluctuations in the matter of future working time.
>
> "An arrangement similar to what we have on the other western roads is feasible and desirable on our part, and I hope you will docket this as a request for an early conference on the subject matter."

A few days later, on February 5, 1935, the General Chairman writes again:

> "The purpose of my request for a conference was to attempt to work out a plan with you establishing a uniform work week.
>
> "We do not want, and are trying to avoid a repetition of a three day work week which we experienced December last. If such retrenchments are necessary we believe the junior men should be laid off * * *."

It is hard to believe that if the General Chairman had considered the original Jaekle letter as containing a five day guarantee he would have written in this tone instead of protesting or at least referring to the repudiation of that guarantee. A little later, on March 6, 1935, an agreement between the parties, formal in language and signed by both parties, was entered into providing in substance that if an entire gang were laid off on any regularly assigned working day because of inclement weather, they would be permitted to work an additional day to which they were not regularly assigned, provided the carrier desired to have them work. This agreement is hardly consistent with a pre-existing five day guarantee under which the men would be paid whether they worked or not. Finally, the original claim of the petitioners in this case, dated April 27, 1935, does not mention the supposed Jaekle agreement but bases the

claim on violations of the seniority provisions of Rules 28 and 53. There are, it is true, references to violations of the Railway Labor Act in not maintaining rules and working conditions arrived at by agreement, but it seems clear from the whole tenor of the claim that these references were not to the Jaekle letter, which was never mentioned, but to the seniority rules of the agreement. The correspondence shows that it was nearly four months after this claim was presented, namely, on August 6, 1935, that for the first time the Jackle letter was brought up and relied on as an agreement.

Under all of these circumstances it can scarcely be argued that the actions and dealings of the parties were such as to permit us to read into the Jaekle letter binding language and binding promises that are not there. We conclude, therefore, that the Jaekle letter must be given its natural meaning and that it amounted not to an agreement but simply to an expression of intention by the carrier to give work to the men which it was not bound to give them and which it was not bound thereafter to maintain.

There remains to be considered the question of whether or not the action of the carrier in December 1934 amounted to a violation of the seniority rules of the Agreement, since the rules speak only of force reductions, and abolition of positions. Since no positions here were abolished, the question is whether laying off certain men two days a week while others, some of whom had less seniority, were kept working five days a week, constitutes a reduction of force within the meaning of the seniority rules. The pertinent rules are as follows:

RULE 36

"LAID OFF EMPLOYES RETAINING SENIORITY RIGHTS.—RULE 36. When employes, laid off by reason of force reduction, desire to retain their seniority rights, they must file with the officer notifying them of the force reduction, their address and renew same each sixty days. Failure to renew the address each sixty days or to return to the service within ten days, after being so notified, will forfeit all seniority rights."

RULE 53

"REDUCTION OF FORCE.—RULE 53. When force is reduced, the senior man in the class on the seniority district capable of doing the work shall be retained."

RULE 54

"DISPLACEMENTS.—RULE 54. When force is reduced or position abolished, an employe, if no position is available, will have the right to displace the junior employe of the same seniority class whose position he is qualified for. If no such junior employe, he may displace the junior employe in the next lower seniority class whose position he is qualified for. An employe so displaced may exercise his seniority rights in the same manner."

RULE 55

"LAID OFF EMPLOYES TO HAVE PREFERENCE.—RULE 55. Employes laid off on account of reduction in force, if competent, shall be given employment on other divisions when there are vacancies, in preference to new men, with the privilege of returning to their former divisions when conditions will permit and regain their former rights."

We must also consider the interpretation of Rule 54 agreed to by the parties June 11, 1931, which provided that:

"The following interpretation and application of Rule 54 of the current Signalmen's Agreement, shall be applied when an employe loses his regular position as a result of force reduction, position abolished, or by displacement, to wit:

"'(2) In event a new position is created, a displaced employe may take such new position.

"'(3) If employe does not desire to exercise the privilege of Section 2, he may displace the junior employe (if his junior) in the same seniority class.

"'(4) If seniority is not sufficient to displace the junior employe in the same seniority class he may displace the junior employe (if his junior) in the next lower seniority class and so on in all lower classes.

"'(5) If employe takes a position as provided in Section 2, and is not the successful applicant for the position, provided it is a position which must be bulletined, or if the position is abolished, and/or if he is displaced thereon, he shall be entitled to again exercise the privileges of this interpretation.

"'(6) All privileges under this Interpretation must be exercised within ten (10) days from date of loss of position, except employes who are on a previously authorized leave of absence, or sick at the time of loss of position, shall be allowed ten (10) days after date of reporting for work to exercise the privileges of this Interpretation.'"

It will be seen in all of these rules and in the interpretation of rule 54 that the term force reduction is used in the sense of a complete severance from the payroll and not in the sense of a reduction in the number of work days per week. The employes contend, however, that that meaning is not exclusive and that laying a man off for two days a week while others are kept working is in substance as much a force reduction as if he was laid off altogether, and in support of this contention they cite United States Railroad Labor Board Decision No. 1040, Docket 1243, June 6, 1922, which reached that result, though under an agreement somewhat different in wording. We need not pass upon this question, because if a man is laid off through a force reduction his remedy is under rule 54 as modified by the interpretation herein above referred to, and under the interpretation he must assert his displacement rights within ten days, which was not done in this case.

The employes state that the privileges were not exercised because the Management had previously taken the position that temporary reduction in the number of work days was not a force reduction within the meaning of the Agreement and that, therefore, it would have been useless to attempt to exercise the privilege. The fact remains that the privilege was not exercised.

One of the objects of the interpretation of rule 54 was to avoid the presentation of seniority claims based on an alleged violation of the rules long after the alleged violation had occurred. If for example, the carrier in reducing force erroneously but in good faith laid off some senior man who should have been retained, he would have the privilege of asserting his displacement right, but it was desired that the assertion should be made promptly in order that the claim might not arise long afterwards when the facts might no longer be clear, and when if the claim were sustained the carrier might be held responsible for retroactive pay. If we are at liberty to interpret the term force reduction in the sense desired by the employes, the desirability of prompt action in the assertion of the employes' rights would be no less than in the case of a man completely severed from the payroll. The record in this case indicates the difficulty of attempting to adjust such claims long after the event. The employes frankly admit that there may be errors in the number of days lost, which they are claiming for various men. There is no evidence to indicate how the work assignments could practically have been arranged to avoid working senior men a less number of days per week than junior men. At the hearing before this Board on March 19, 1936, the representative of the employes said that the only practical way in which the desired object could have been accomplished would have been to lay off altogether enough men to enable the remainder to work five days a week; that it would not have been practical because of the intermixture of the work to assign junior men to three days a week and senior men to five. If we assume then that enough junior employes should have been laid off altogether to enable the seniors to work five days a week, a calculation based upon the division roster, the number of days lost as claimed by the employes and the dates contained in the December 1934 calendar will show that approximately fifteen men would have had to lay off completely in order to enable the remainder to work five days a week. But the documents just mentioned show that five of these fifteen men would have been among the claimants listed by the petitioner, for among these claimants were some men with very little seniority. The remaining ten of the fifteen would have had to come from the signal maintainer force, but there is nothing in the record one way or the other to show that the signal maintainer force

could have been feasibly reduced by that number or that if men had been shifted from the signal gangs and signal repair shop the requirements of the service could have been met in the latter positions. We cite these difficulties presented by the record not in criticism of the employes but as a possible explanation of why so short a period for asserting claims was provided for in the interpretation.

It may be that the period is too short for practical purposes and it may be also that the attitude of the Management toward the meaning of the term force reduction has been such as to discourage employes from acting upon the interpretation. But if there are these defects in the provisions of the interpretation we cannot remedy them or disregard the existing provisions in our decision. The remedy, if one is needed, can come only from negotiation and agreement.

It was suggested at the hearing that the interpretation does not apply to this case because it deals with employes who lose their regular positions, whereas these employes were merely laid off two days a week. But since all the seniority rules treat the term force reduction in the sense of the loss of position, the employes must in order to get the benefits of the rules, assert that the loss of two days a week is the same thing in substance, though not in degree, as the loss of position. And if that contention is sustained, then the interpretation becomes applicable and the claim falls because not exercised within the time limit. But if the contention is not sustained, then the loss of work days was not a force reduction within the meaning of the seniority rules and the claim will fall on that ground. The employes cannot take the benefits of the seniority rules without their burdens or ask for the sweet without the bitter. If the result is that an injustice would have been suffered without a remedy, the fault is in the Agreement, but this Board cannot change the Agreement or subtract from or add to its terms.

AWARD

Claim denied.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 26th day of March 1936.