Award Number 290
Docket Number MW-160

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
FORT WORTH AND DENVER CITY RAILWAY COMPANY
THE WICHITA VALLEY RAILWAY COMPANY

DISPUTE.—

"(a) Violation of Rules 16 and 25 of current agreement.
"(b) Reimbursement for wage loss suffered."

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 employes 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.

An agreement bearing date of January 16, 1929, is in effect between the parties.

The case being deadlocked, Willard E. Hotchkiss was called in as Referee to sit with the Division as a member thereof.

THE PETITIONERS STATEMENT OF FACTS.—From October 25 to November 1, 1934, inclusive, all Maintenance of Way forces represented by the Brotherhood, and including the foremen classes, were laid off on the Amarilla and North and South Plains Lines.

Effective November 17, 1934, all Maintenance of Way classes represented by the Brotherhood, and including the foremen classes, were arbitrarily assigned to a five-day work week and less where holidays occurred, and the lay-off days were arbitrarily designated by Management for the several classes.

All such Maintenance of Way forces so assigned suffered a reduction in their earnings proportionate to the lay-offs heretofore referred to.

The Carrier gave no notice to, nor conferred with, the representatives of the employes prior to the lay-off from October 25 to November 1, above described, nor with respect to the arbitrary establishment of the five-day week effective November 17, 1934.

An agreement exists between the Organization and the Carrier, parties to this dispute, the effective date of the current agreement being January 16, 1929.

Conferences have been held in accordance with the provisions of the amended Railway Labor Act and no agreement disposing of the dispute has been reached.

The Carrier declined to join with the representatives of the employes in a joint submission of the dispute to the Third Division of the National Railroad Adjustment Board.

Rules 16 and 25 heretofore referred to read:

"RULE 16. *Supervisory Employes.*—Employes whose responsibilities and/or supervisory duties require service in excess of the working hours or days assigned for the general force will be compensated on a monthly rate to cover all services rendered, except that when such employes are required to perform work which is not a part of their responsibilities or supervisory duties, on Sundays, or in excess of the established working hours, such work will be paid for on the basis provided in these rules in addition to the monthly rate. Section foremen required to walk or patrol track on Sundays

shall be paid therefor on the basis provided in these rules in addition to the monthly rate.

"RULE 25. *Seniority.*—(a) *Seniority Datum.*—Seniority begins at time employe's pay starts.

"Rights accruing to employes under their seniority entitle them to consideration only for promotions to new positions or vacancies or in the event of reduction in force in accordance with their relative length of service with the Railway as hereinafter provided.

"(b) *Rights of Foreman.*—Seniority rights of Track Department foremen and assistant foremen will be confined to the railway and one Superintendent's division.

"(c) *Rights of Laborers.*—Seniority rights of track laborers will be separate and distinct as between section and extra gang laborers and will be confined to their respective gangs, except in case of promotion when laborers may bid on vacancies or new positions as a Roadmaster's district. When forces are reduced, section laborers may displace section laborers junior in service on a Roadmaster's district and extra gang laborers may displace extra gang laborers junior in service on a Superintendent's division.

"(d) *Rights of B. & B. Department Employes.*—Seniority rights of Bridge and Building Department employes, also miscellaneous employes, such as ditcher, pile driver, clamshell, and similar crews will be confined to the Railway on which employed.

"(e) *Reduction of Track Force.*—When track force is reduced, foremen will first displace junior foremen on their seniority district before displacing any laborers. No foreman will displace a laborer unless he holds seniority rights as such.

(f) *Reduction of B. & B. Department Force.*—When Bridge and Building force is reduced, foremen will first displace junior foremen on their seniority district before displacing any mechanics. If necessary to displace mechanics, their seniority will apply from the date employed as or promoted to mechanics. Mechanics will be permitted to exercise their full seniority right during force reduction on their respective seniority district. No mechanic will displace a laborer unless he has served in that capacity prior to his promotion.

(g) *Temporary service.*—Employes assigned to temporary service may, when released, return to the position from which taken without loss of seniority.

(h) *Retention in Transfer.*—Employes temporarily transferred by direction of the Management from one seniority district to another will retain their seniority rights on the district from which transferred.

(i) *Transfer to Another Division.*—Except for temporary service, employes will not be transferred to another division unless they so desire. It is understood that, under this rule, temporary service will not exceed ninety (90) days.

(j) *Excepted and Official Positions.*—Employes now filling or promoted to excepted, semi-official, or official positions will retain their seniority rights in the department from which promoted, and if returned to former classification, it will be in accordance with sections (e) and (f) of this rule (25).

(k) *Change of District.*—In case of change in seniority districts a relative proportion of the total employes affected will be transferred to, and their seniority rights adjusted in, the revised district by the Management with a properly constituted committee representing the employes.

(l) *Roster.*—Seniority rosters of employes of each subdepartment by seniority districts will be separately compiled. Copies will be furnished employes' representative and to the foreman for posting.

(m) *Scope of Roster.*—Roster will show name and date of entry of employes into the service of the Railway and date of promotion, except that names of track laborers will not be included and their seniority rights will not be applied until they have been in the continuous service of the Railway in excess of six (6) months.

(n) *Roster Revision.*—Rosters will be revised in January of each year and will be open for correction for a period not exceeding sixty (60) days thereafter. If no exception is taken by any employe to his rank during the first sixty (60) days after it appears on the seniority roster, his rank, as given, will not be subject to change until the next roster revision.

"(o) (Retention of Rights in Force Reduction.) When employes laid off by reason of force reduction desire to retain their seniority rights, they must signify such intention by immediately filing with immediate superior officer their name and permanent address, and, in the event of change in address, will immediately notify same officer. If not notified within nine (9) months to return to work, their seniority will cease. Failure to return to service within ten (10) days after being notified in writing or by telegram at last address given will forfeit all seniority rights, this rule not to apply to employes in service less than sixty (60) days.

"(p) (Exceptions.) The general rule of promotion and seniority will not apply to positions of track, bridge, and highway crossing watchmen and signalmen at non-interlocked crossings, but such positions will be filled by incapacitated employes covered by this agreement when available, and if not, they may be chosen from any department. This rule not to permit bumping of such incapacitated employe after he is chosen and is capable of filling position to which assigned."

PETITIONERS' HISTORY OF DISPUTE.—Following their Statement of Facts Petitioners submitted an extended history of dispute in two parts. The significant contents of this history are as follows:

(1) Dates and summary of correspondence regarding the occurrences leading up to the case.

(2) References to conferences held.

(3) Circumstances concerning submission to National Mediation Board and refusal of said Board to take jurisdiction.

(4) Analyses of Rules 16 and 25 and manner of applying same.

(5) Reassertion of violations of Rules 16 and 25 and statement of grievance, to-wit:

"(a) Foremen classes affected have suffered a reduction in their monthly compensations.

"(b) Both foremen and hourly-rated employes have been frustrated in the exercise of rights and privileges guaranteed them by seniority rules.

"(c) Senior foremen and hourly-rated employes have been forced to share work opportunities and earnings with junior employes.

"(d) Foremen have been compelled, due to Carrier's own rules and regulations, to respond to a continuation of their duties and responsibilities on their lay-off days, for which no compensation was allowed."

Petitioners concluded original presentation of this case with 23 exhibits, to-wit:

Exhibits 1 to 13, inclusive, letters exchanged between J. D. Farrington, General Manager, and W. O. Beaver, General Chairman, J. W. Bussey, General Chairman, and F. C. Gassman, Vice President, Brotherhood of Maintenance of Way Employes, between January 11, 1933, and November 17, 1934.

Exhibit 14, copies of orders concerning lay-off issued November 16th and 18th, 1934.

Exhibit 15, telegram, J. W. Bussey to F. C. Gassman, advising of lay-off and requesting instructions.

Exhibits 16 to 21, further correspondence between Messrs. Farrington and Bussey, October 26, 1934, to November 9, 1934.

Exhibit 22, copies of Rules 124 to 192, inclusive, governing Maintenance of Way Employes.

Exhibit 23, Arbitration proceedings, Brotherhood of Railroad Signalmen versus Grand Central Terminal, concerning a claimed violation of the Railway Labor Act of 1926 by placing employes on a five-day-week basis, effective August 17, 1932.

CARRIER'S STATEMENT OF FACT.—

"Effective October 25, 1934, track foremen and track laborers were laid off for balance of the month of October 1934. Effective November 17, 1934, track foremen and track laborers were assigned with one working day lay-off per week in addition to Sundays and holidays."

The carrier then quotes Rules 16 and 25 in full, as quoted above.

POSITION OF CARRIER.—

"It is the position of the Carriers that layoffs for short periods of time and regular layoffs of one working day per week in addition to Sundays and holidays do not constitute violations or wage schedule agreement

Rules 16 and 25 and that the duly accredited representatives of the Employes have recognized and have by their action in effect approved and concurred in the Carriers' application of those rules of which they now complain."

The Carrier's elaboration of this position may be summarized as follows:

October 12, 1931, track and bridge and building forces, including foremen, were laid off one working day per week after notice to General Chairman. Bridge and building forces have continued uninterruptedly to be so laid off since that time. Action protested by Brotherhood insofar as track forces were concerned.

November 1, 1931—track foremen restored to six-day assignment with the stated purpose of performing certain enumerated duties.

November 27, 1931—written agreement resulting from protest by the Brotherhood, which agreement is shown later on as Carrier's Exhibit "A", page 11.

November 27, 1931 (same day as Memorandum of Agreement), letter from *Farrington to Gassman that one working day lay off was regarded as only a* temporary arrangement not to be applied to foremen unless absolutely necessary and not expected to extend beyond April 30, 1932. This letter was written in confirmation of facts stated in conference November 26, 1931, and appears in the record as Exhibit "A", page 12. The exhibit shows Gassman and Beaver as concurring.

March 1, 1932, track laborers returned to six-day assignment.

End of March 1932, last three days lay off for track laborers. Action was protested by Brotherhood.

May 17, 1932, track laborers put on five-day assignment. Action protested by Brotherhood.

January 9, 1933, five-day week extended to foremen. Action protested by Brotherhood on January 11th.

End of January 1933 track laborers in certain territories laid off for balance of the month without protest.

February 7, 1933, conference and letter from Farrington to Gassman that five-day week was considered a temporary measure only and not expected to be applied to foremen beyond April 30, 1933. Letter as shown in Exhibit "A", page 18, bears endorsement by Gassman and Beaver.

June 1, 1934, track laborers and foremen returned to six-day week.

October 25, 1934, track foremen and laborers laid off for balance of the month after notice to General Chairman. It was stated that this action brought the first protest from the Brotherhood against end-of-month layoff in letter of October 26, 1934, as shown in Exhibit "A", page 29.

Letter from Beaver to Farrington (Exhibit "A", page 29), quotes Rule 16 of Agreement and quotes from Section 6 of the Amended Railway Labor Act in regard to conferences on "grievances or interpretations of agreements"; also quotes from Section 7 as to changing rates of pay.

November 17, 1934, track formen and laborers put on five-day week after previous notice in conference held on October 27th. Notice confirmed by letter November 17, 1934.

The carrier claims that the record of correspondence and conferences as outlined above and as shown in the Exhibits attached to the record proves that the "Employes have recognized and by their action have in effect approved and concurred in the Carrier's application of Rules 16 and 25 in the adoption of the so-called five day week. Special attention is called to the fact that throughout all of this period commencing in October 1931, the B. & B. foreman, carpenters, and helpers have been on an assignment of five days per week. This was with *the full knowledge of the representatives of the Employes but without protest* by them. The complaint appears to be confined to track forces, and indeed to track foremen. Rule 16 applies with equal force to B. & B. foremen and track foremen. Rule 25 contains provisions concerning track laborers and provisions applicable to B. & B. carpenters and helpers."

The argument then developed the origin of Rule 16 in Article V–(1) of the agreement between the Director General of Railroads and the Maintenance of Way Employes and Shop Laborers in November 1919, otherwise known as the National Agreement. It also outlined the previous operation of the rule and maintained that its purpose is "to pay additional for overage in work, or overtime, and not as a guarantee."

The argument further stressed the fact that the occasional balance-of-month layoffs and the regular one day off per week are not reductions in force in the

sense that the term is used in Rule 25 and are not prohibited by the provisions of that rule or any other rule in the wage schedule agreement. It was pointed out that while such a prohibition was once contained in the rules, it was removed from the agreement and has not been in effect for a period of 14 years. The earlier rule read:

> "Gangs will not be laid off for short periods when proper reductions of expenses can be accomplished by first laying off the junior men."

It was further pointed out that effort was made to reestablish a prohibition similar to the one contained in the former rule, but without success.

This line of argument concluded with the statement that the "removal of the inhibition against indulging in short layoffs instead of force reductions, which removal was made with full and complete understanding and agreement by the respective parties and with open eyes, was action that was positive in its nature and shows that such restraint as there was against layoffs was removed from the agreement many years ago and that there is nothing now to prevent the Carriers from applying the kind of assignments of which complaint is made."

The last item in the setting forth of the Carrier's position is intended to show the effect of adopting the contention of the Brotherhood. This is the language employed:

> "It has been the position of the Brotherhood that it preferred a straight reduction in force, which, in the case of section foremen, would demote nine of them to track laborers, uproot them and cause removal of themselves and their families to other locations, rather than to allow such section foremen to retain their present positions, remain headquartered as they are and work reduced time in the off season, which plan the Carriers believe, aside from their position that they have a perfect right to so arrange assignments, is the sensible thing to do and is fair and just treatment of the employes affected."

Exhibit "A" attached to carrier's brief for the most part duplicates the correspondence which is attached to the petitioner's brief. Several of the letters shown in the carrier's exhibits bear indication of concurrence by representatives of the petitioners over their signatures. This point is stressed by the carrier. Page 11 of carrier's Exhibit "A" is a Memorandum of Agreement bearing date November 27, 1931, to-wit:

> "MEMORANDUM OF AGREEMENT
>
> FORT WORTH, TEXAS, *Nov. 27, 1931.*
>
> IT IS AGREED, that in the application of the layoff day arrangement now in effect, employes called to perform work on their layoff day, will be paid for work performed, as follows:
>
> Where service is performed for the full period of the regular work day and the ninth and tenth hours continuous therewith, he will be paid at pro rata rates;
>
> Where service is performed for less than the full work day period, the three hours minimum provided by Rule 9 will apply for the first two hours of service performed, beyond which, if within the regular work day period, will be paid for at pro rata rates.
>
> For Fort Worth and Denver City Railway Company; the Wichita Valley Railway Company:
>
> (Signed) J. D. FARRINGTON,
> *General Manager.*
>
> For the maintenance of way employees:
>
> (Signed) F. C. GASSMAN,
> *Vive President*, B. M. W. E.
> (Signed) W. O. BEAVER,
> *General Chairman*, B. M. W. E."

In a letter of February 7, 1933, Exhibit "A", page 18, to which reference was made above, Mr. Farrington used this language—"Our action in establishing temporarily a five day assignment was, we felt, in keeping with the understanding reached during our conference of November 26, 1931. Please be assured that this is a temporary measure only and that we will not apply it to track foremen beyond April 30th without a further conference with you."

The final document in the record is a brief résumé of the positions of the employes and carrier, respectively, upon the principal contentions contained in the record. Following are some of the chief points made by the carrier in this document:

(1) The employes' history of the dispute opens with a letter January 11, 1933, whereas 14 communications had passed between the parties prior to that time.

(2) Carrier takes exception to statement in referring to carrier's letter November 25, 1933, that no previous understanding existed and cites from pages 12 and 18 of carrier's exhibits, letters from Mr. Farrington to Messrs. Gassman and Beaver, bearing dates November 27, 1931, and February 7, 1933, both concurred in by them.

(3) Referring to first paragraph, page 3 of petitioner's history of the dispute, carrier submits that the whole correspondence contained in the carrier's exhibit "carries a connected story and shows that the employees' representatives tacitly agreed to, and more than that, they positively concurred and acquiesced in the reduced time arrangement."

(4) Passing over some further discussion in reference to employees having been notified of intentions of the carrier, carrier answers the argument concerning the availability of foremen for service on call, by saying that when a foreman is called out and performs service he is paid additionally therefor.

(5) In reference to Exhibit 22, consisting of a reproduction of Rules and Instructions Governing Maintenance of Way and Structures, carrier says:

> "It is apparent that this reference concerns rules and instructions of Chicago, Burlington and Quincy Railroad Company. These rules have no place in the Employes' submission because during the period of this dispute and at the time the Employes' ex parte submission was written the rules were not in effect on Fort Worth and Denver City Railway and Wichita Valley Railway. It is true that quite recently, or, to be exact, effective January 1, 1936, these rules were adopted as those of Fort Worth and Denver City Railway Company and The Wichita Valley Railway Company."

(6) Carrier corrects petitioners' reference to Wichita Valley Railway as a Class I Railroad and says that it has not been a class I carrier for four years.

(7) Carrier contends that award of Board of Arbitration in dispute between Signalmen and Grand Central Terminal, cited by employees, is not relevant and stresses the fact that the award covered such matters disposed of by arbitration instead of by adjustment.

(8) Carrier points out that employees first took the instant dispute to the National Mediation Board on ground that there was a change of working conditions without conference, but the Mediation Board declined to handle case and referred it to National Adjustment Board.

(9) Carrier takes exception to reference, page 14 of petitioner's history of dispute, to citation of mileage limitation for railway trainmen. Carrier also submits certain alleged corrections of fact in this citation.

There are certain other matters contained in this final document which may have a bearing on the issue but they were adequately covered in early parts of the record.

The petitioners did not submit a documentary reply to the carrier's material just outlined.

Arguments Before Referee

FOR THE PETITIONER.—The brief prepared in behalf of petitioners and supported by oral argument before the Referee differentiated the dispute as applied to (a) foremen, and (b) hourly rated employes.

AS APPLIED TO FOREMEN.—The brief stressed the amount of clerical and incidental duties required of foremen. It was explained that foremen were regarded as monthly rated employees who were not required to lose time except when laying off of their own accord. The argument was advanced that the only difference between their former and present status is that they are now paid additional for actual service performed outside of working hours.

Reference was made to Decision No. 2 of the United States Railroad Labor Board in which the contention of the management was followed and a monthly rate of wages set up based on the working days in the month. In establishing this arrangement, employees were required to take care of clerical and supervisory duties without additional pay. Reference was also made to other de-

cisions of the United States Railroad Labor Board confirming the action just cited. Several other citations were made in which the method of paying monthly rated employees was further developed. Throughout the argument, emphasis was laid on the fact that foremen are always subject to call.

Following this part of the brief was a rather extensive list of citations from court decisions, the purport of which was that persons hired by the month are entitled to full month's pay provided they are ready and willing to work. It was noted that some cases are in conflict with this doctrine.

ARGUMENT IN REFERENCE TO HOURLY RATED EMPLOYEES.—The case as applied to hourly rated employees was argued under Rule 25 and attention was called to the fact that they are the lowest paid employees on the railroad. The further fact was noted that the managements of the railroads appearing before the United States Railroad Labor Board in their hearings on rules, had contended that it was necessary to work this class of employees seven days per week, ten hours per day. For this reason it was held that seniority rules were sufficient to guarantee a full week's work of six days at eight hours. It was stated that the management at that time asked for no rule permitting deviation from seniority rule, and that the only cases of lay-off were end of month lay-offs which rarely happen except at Christmas and New Years.

The question of what constitutes a reduction in force was then argued and the point was urged that if the company's interpretation prevailed, seniority rules could be defeated in their entirety.

Further argument was made that because the employees cooperated with the management and adjusted themselves to appeals to divide the work following 1930, is no reason why they should continue to permit a procedure which undermines the seniority provisions of the agreement. In this connection exception was taken to the interpretation placed by the management upon the Memorandum of Agreement of November 27, 1931, as expressing the employees' willingness to continue indefinitely the program of lay-offs which had previously been followed.

Toward the end of the brief a table was submitted indicating what the wages of foremen and section men would become if the working week were reduced progressively from five, to four, to three, to two days, and finally to one day. It was shown that the pay of foreman would be $20.00 and section men $10.20. From this showing the argument was made that if the management's contention should prevail they could place the employees on any number of days per week they desire, and thus bring about absurdedly low wages.

The further argument was advanced that it makes no difference to the management whether they work five men six days per week, or six men five days per week, but it does make a great deal of difference to the employees whose seniority rights are impaired by being laid off.

FOR THE CARRIER.—Argument in behalf of the carrier emphasized the fact that Bridge and Building forces have worked five days per week uninterruptedly for four and one half years, and that track forces have worked five days per week seasonally for five years.

The Memorandum of Agreement of November 27, 1931, was quoted and interpreted as a definite recognition of the lay-off arrangements adopted by the management. The letter from Mr. Farrington to Messrs. Gassman and Beaver of the same date, showing them as concurring, was cited as evidence that they understood the arrangement and agreed to it.

Several items in the history of the dispute were reviewed and interpreted to mean that the petitioners did not consider anything covered in the conferences and correspondence as containing a six-day guarantee.

Rule 23 was cited along with Rules 16 and 25, and emphasis was laid upon the fact that Rule 23 specifically states that "The hours of employees covered by this rule shall not be reduced below eight for six days per week", whereas, Rule 16 contains no such language. In respect to Rule 25 it was argued that the seniority covered by it only refers to consideration for promotion and in filling vacancies, and in the event of reduction in force. The point was then stressed that a lay-off is not a reduction in force. It was argued that if seniority rules were intended to cover lay-offs they would have so stated.

The further contention was made that the petitioners, in analyzing Rule 25, confirmed this point of view when they said, "we build our argument in this case more upon the basic purpose and intent of the seniority principle as contained in Rule 25 as a whole than upon any of the detailed specifications written into the agreement."

Referring to the petitioner's citation of Arbitration Award in case of the Signalmen versus Grand Central Terminal, the point was made that this award was based on violation of the Railway Labor Act of 1926, and that Referee Garrison, in Award No. 219, Docket SG–227, before this Division, denied a similar claim of the employees, although the Arbitration Award in question was cited in evidence. Awards 31, 32, and 189 by this Division were cited as precedents, that the laying-off of employees a certain number of days per week does not constitute a reduction in force. The United States Railroad Labor Board Decisions Nos. 334, 519, 771, and 1667 were also cited as covering a claim that laying-off employees one or two days a week instead of reducing forces was a violation of the rules, but in none of these cases was the claim sustained.

OPINION OF REFEREE.—The part of this case that has to do with foreman follows a somewhat different line of argument than the part that has to do with other classes.

With respect to foreman, the following questions appear to be in issue:

1. Under what circumstances does payment on a monthly basis carry obligation to pay for a full month in case the employee in question is ready and willing to work?

2. Are the circumstances which would carry a guarantee of a month's pay to a monthly-rated employee present in this case?

3. What was the status of these monthly-rated employees before and after the change in the agreements by which they began to be paid for work done outside of the regular working hours, and what effect, if any, has this change upon the instant case?

4. What bearing does the fact that foremen are subject to call at all times have upon this claim?

5. What bearing does the citation from Rule 23: "Hours of Employes covered by this Rule shall not be reduced below eight per day for six days per week", have on the instant case in view of the fact that Rules 16 and 25 do not contain this language?

6. What weight should be given to the earlier provisions restricting management in respect to lay-offs for short periods in view of the fact that these restrictions have been eliminated?

7. What is the significance of the Memorandum of Agreement entered into in November 27, 1931, and of the conferences and correspondence associated with this Agreement?

8. What effect should be given to the statement of Mr. Farrington that he did not intend to extend the lay-off for foremen beyond April 30, 1933, and to his promise that he would not do so without conference?

9. What weight, if any, should be given to the attempt of petitioners to carry this case to the Mediation Board?

10. What weight should be given to the fact that this case does not cover the B & B employees, whereas Rules 16 and 25 apply to them, the same as to the track employees?

11. What bearing have previous decisions upon this claim?

12. What status, as a grievance, has this claim under the provisions of the amended Railway Labor Act, to-wit: Section 2, under General Duties, first paragraph, as to settling disputes arising out of the application of agreements, or otherwise; and the seventh paragraph, under the same heading as to changing rates of pay and working conditions; and Section 3 (i) concerning the handling of disputes growing out of grievances or out of the interpretation or application of agreements?

Let us consider the above questions in order:

Referring to Question No. 1, it would appear that in the absence of contrary understanding or practice in a given case, under many circumstances employment by the month would imply an obligation on the part of the employer to give a month's pay if the employee were ready and willing to work; and yet under few circumstances could such guarantee be absolute since it is almost universally recognized that employment may be discontinued under conditions of adversity or depression. In fact in the present case the right to reduce force is recognized. In other words, the obligation to give a month's pay is somewhat conditioned by the work to be done, and the financial situation of the employer.

As to Question No. 2, whether the circumstances which would carry a guarantee of a month's pay are present in the instant case, the answer must be found

either in the terms of the Agreement or in the background of facts set forth in the record and in arguments thereon. The language of Rule 16 is not conclusive on this point. The record contains some information concerning the background of the Rule, but this, too, is lacking in conclusiveness. Consideration of this background and of Rule 16 leads into the remaining questions above propounded.

Coming to Question No. 3, the Agreement now provides that foremen are paid for overtime under stated conditions, whereas formerly they were not so paid. There is nothing in the record to show that this change was accompanied by any change of status as to receiving pay for a full month. It does not appear that the employees either relinquished any previous rights in return for overtime pay, or gained any new ones except the right to be paid for overtime. Change of status as to the one item of overtime cannot be regarded as of more than purely speculative significance in the instant case.

Question No. 4 relates to the fact that foremen are subject to call. There are many situations in which readiness to serve is recognized contractually and otherwise as something to be paid for over and above the actual service performed. If this were an arbitration case, the fact that foremen are subject to call at practically all times and under all sorts of conditions would create a strong presumption in equity, under a contract of employment by the month, that they were to be paid a full month's pay if they are ready and willing to work a full month.

The fact that they are paid extra when specifically called might, according to circumstances, and in the absence of specific agreement on the point, tend to minimize their claim for a guaranteed month's pay, but would not necessarily defeat it. The bearing of foremen being subject to call, on the one hand, and on the other, of being paid extra for work done when specifically called, must remain largely a matter of speculation, except insofar as the circumstances can be in some way tied in with the terms of the Agreement or with the provisions of the Amended Railway Labor Act.

Question No. 5 relates to citation before the Referee from Rule 23, which restricts the Carrier from reducing the hours of watchman below eight per day for six days per week. The Referee does not regard the presence of this restriction in Rule 23 and its absence in Rules 16 and 25 as having much weight, in the absence of knowledge of all the circumstances that lead to its inclusion in the one case and its omission in the other.

Question No. 6 relates to the employees covered by this case. In a rule formerly in force it was provided "that gangs will not be laid off for short periods when proper reductions of expense can be accomplished by first laying off junior men." The record is not entirely clear as to the inclusion of foremen in this provision.

Question No. 7 concerns the Memorandum of Agreement of November 27, 1931. In view of industrial conditions at the time this Agreement was made, and of the fact that these conditions continued to worsen for a long period thereafter, and in view of the nation-wide movement to "share the work", the Referee is not inclined to attach much weight to this agreement in its relation to the instant case. It represented no more than a statement of acquiescence, for the time being, in the program which was in force at the moment, together with an effort to protect employes in the application of that program.

Question No. 8 is with reference to Mr. Farrington's letter of February 7, 1933, and his promise not to extend lay-offs beyond April 30th without conference. The fact of securing the acceptance of this letter by representatives of the employees over their signatures gave to the letter, to all intents and purposes, the character of a temporary agreement. Mr. Farrington's later admission that he should have notified the petitioner does not cover the case, since what he agreed to was not a notice but a conference. Although the carrier denies legal obligation in the matter, this letter would have persuasive if not controlling force if the instant case were a claim for pay for foremen on a six-day basis between April 30, 1933, and the date, later in that year, when they were returned to a six-day assignment.

Although the letter of February 7, 1933, was essentially a temporary agreement, it is clear that the chain of events and the correspondence later that year served as an effective denouncement of it by the carrier. It was not an agreement as contemplated by Section 6 of the Amended Railway Labor Act (compare Award Number 272, Docket CL–276). Except as throwing light on the attitude of the parties the letter of February 7, 1933, does not affect this claim, which runs from October 25, 1934.

Question No. 9 concerns the bearing on this claim of the action of the petitioners in trying to submit the case to the Mediation Board. As the Referee views this circumstance, taken together with all the factors in the case, this action merely reflected a belief that petitioners had a grievance and indicated that they were making an effort to find the proper channel through which the grievance might be redressed. The action does, to be sure, reveal considerable doubt as to whether the grievance is covered by the agreement. As the Referee reads the whole record, the petitioners have made no attempt to conceal the reasonable doubt element in this case.

Question No. 10 has to do with the omission of the petitioners to cover the B. & B. employees in this claim. The Referee is not inclined to give great weight to this omission. Although the point is not featured in the record, it is entirely possible that this case was brought to test the application of Rules 16 and 25. In case of a favorable decision, the B. & B. employees could readily be covered in under the decision at a later date.

Question No. 11 has to do with the bearing of previous decisions. Petitioners cited the case of the Railroad Signalmen versus Grand Central Terminal, United States Board of Mediation, C–752, ARB (Petitioners' Exhibit 23). In this case a board of arbitration ordered a six-day week restored. The Carrier, as above noted, maintained that the case was not relevant and pointed out that it was an arbitration, not an adjustment case.

In argument for the carrier, United States Labor Board decisions 334, 519, 771, and 1667 were cited as all having involved protests of Maintenance of Way employees' representatives against lay-off of employees instead of reducing forces. The point was stressed that all these cases were decided adversely to the claimants. The force of at least some of these cases is somewhat enhanced by the fact that they were argued under the provision of Article V, Section 1, that "gangs will not be laid off for short periods when proper reduction of expense can be accomplished by first laying off the junior men", which provision has since been eliminated from the agreement with this carrier. However, the circumstances are not identical. Award 32, Docket MW–37, by this Division, was made under an agreement, in which the language of Article V, Section 1, was retained and was remanded to the parties.

In Award 189, Docket SG–95, Referee Samuell denied a claim on account of lay-off apparently on the ground that another agreement with the same carrier prohibited lay-off of the kind complained of, whereas the agreement in question did not contain such prohibition. The claim was denied with a reprimand to the Carrier for its abrupt departure from a long time custom.

In Award 219, Docket SG–227, Referee Garrison denied a claim in which the circumstances were essentially different from those in the instant case, but he did inferentially draw a line between a lay-off and a reduction of force, and suggested that if the agreement under consideration in that case resulted in an injustice without a remedy the fault was in the agreement, and he added "but this Board cannot change the agreement or subtract from or add to its terms."

Argument for petitioners cited United States Labor Board Decision No. 2 as bearing on origin and purpose of Rule 16, and Decision 501 as continuing the rule. In this instance, reference was made to circumstances which indicated that the management considered foremen on a monthly basis and entitled to a full month's pay. Reference was also made to other decisions to the same general effect.

The strongest case cited for petitioners was Decision 91, Docket 191, in which it was held that the Erie Railroad had violated Decision No. 2: (1) "By deducting the January 31st earnings from the January earnings of all monthly rated employees not consenting to such deductions", and (2) "By deducting 4/28 of the February earnings of all monthly rated employees not consenting to such deductions." Here again the facts are not entirely parallel to those of the instant case.

Question No. 12, the last of those propounded above, has to do with certain provisions of the amended Railway Labor Act, as applied to this claim. The first two paragraphs under General Duties, which outline provisions for making agreements and settling disputes, refers to the duties "to settle all disputes whether arising out of the application of agreements or otherwise." The seventh paragraph of Section 2 provides that Carriers shall not change rates of pay or working conditions, except as prescribed in the agreement or in Section 6 of the Act. Section 3 (i) provides that disputes between an employee

or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements shall be handled as specified and failing agreement may be referred to the appropriate division of this Board.

The phrase in Section 2, "arising out of the application of such agreements or otherwise", and the phrase in Section 3 (i), "growing out of grievances or out of the interpretation or application of agreements", seem to carry the inference that grievances other than those specifically related to agreements may be considered in the regular procedures outlined under the Act, as amended. However, a study of the cases handled by this Board indicates reluctance to go beyond the scope of agreements.

In connection with cases heard by this Referee, citations in respect to jurisdiction have been made to decisions handed down by other Referees, particularly by Referee Samuell. In Award No. 42, Docket TD-38, Referee Samuell, after outlining his reasons for restricting jurisdiction to cases arising out of agreements, observed that the language used in the Act is not identical to his interpretation.

Moreover, decision to confine jurisdiction to cases arising out of agreements does not necessarily dispose of the issue completely. It would still be competent to inquire in a given case what the phrase, "arising out of agreements", really signifies as applied to the case in dispute. In the instant case, it is fairly clear that the case arises out of an agreement, but the question to decide is whether or not it is covered by the agreement. Review of the cases heard by this Division shows the members of the Division fairly in accord, that it is incumbent upon Referees not to do violence to the language of Agreements. To repeat the above quotation from Referee Garrison in Award 219, Docket SG-227, "This Board cannot change the Agreement or subtract from or add to its terms." His observation, in the same connection, that if the agreement involved in that case resulted in an injustice without a remedy, the fault was in the agreement, is also pertinent.

CLAIM AS APPLIED TO HOURLY RATED EMPLOYEES.—As above noted, the claim in behalf of foremen is made under rules 16 and 25, whereas hourly rated employees are only covered by Rule 25. All the arguments intended to sustain the contention that foremen are monthly rated employees with a month's pay guaranteed, applies exclusively to the claim of foremen and not to the claim of hourly rated employees.

As above noted, it was argued that if the Carrier's position were sustained in this case he could progressively give longer and longer lay-offs, so that employees might finally find themselves working as little as one day a week.

While this argument has force, it is obvious that such extreme action on the part of the Carrier unless supported by clear evidence of dire necessity, would indicate a purpose to destroy the Agreement rather than to work under it. It is not likely that any Board, or Referee, would be inclined to uphold such action, irrespective of the disposition made of the instant case. In this connection, it should be noted that there is at least one reference in the record to lay-offs of more than one working day per week. On the other hand, the evidence presented indicates that the practice in respect to lay-offs has been confined chiefly to end-of-month lay-offs and one-day lay-offs per week, excepting weeks in which holidays occur. Any decision sustaining the carrier in these end-of-month and one-week-day-a-week lay-offs could only be applied to these lay-offs and not to the hypothetical cases cited by petitioners.

The Referee has given careful study to the agreement under which this case is brought and to all of the facts contained in the record. The record indicates some doubt on the part of both parties to the dispute as to the proper interpretation of the Agreement in respect to lay-offs of the kind that have given rise to this claim. This is particularly true as applied to foremen. The record reveals that the petitioners consider the practice out of harmony at least with the spirit of the Agreement. This is clearly shown by the statement that, "We build our argument in this case more upon the basic purpose and intent of the seniority principle as contained in Rule 25 as a whole, than upon any of the detail specifications written into the Agreement."

Finding the application of the agreement by the carrier distasteful, the petitioners have proceeded in an entirely proper manner to explore possible remedies for a condition which they believe constitutes a grievance. Attempting to bring this case to the Mediation Board was a legitimate item in this exploration and should not be held to prejudice the case before this Board.

If it were possible to sustain the contention of petitioners that the practice of carrier in respect to lay-offs constitutes a violation of the Agreement, the fact that the petitioners had acquiesced during a period of depression should not be held against them. Even in the absence of previous rulings on the point, it should be recognized as natural that, with the return of prosperity, employees and their representatives should insist upon restoration to full force and effect of provisions of their agreement which they may have waived during the depression. If the practices followed by the employer during practically the whole period of the depression were indeed violations of the agreement, the argument that the employees should not be penalized for a spirit of co-operation would have great force.

Extensive lay-off of a whole force unquestionably has an adverse effect on seniority rights, and any lay-off for a monthly paid employee obviously impairs the benefit of the monthly salary, as stated in the contract. This is the essence of the grievance for which the petitioners claim redress. Since it appears to be a legitimate grievance, the Referee has sought diligently for something in the Agreement to which he might attach suitable redress in deciding this claim. Failing this, he has given considerable study to the amended Railway Labor Act and to previous decisions thereon.

In regard to foremen, the Referee is unable to find in the record of this case evidence to support the contention that Rule 16 contains a guarantee of a full month's pay. Concerning the whole issue, Rule 25 (a) provides that, "rights accruing to employees under their seniority entitle them to consideration only for promotions to new positions or vacancies, or in the event of reduction in force, in accordance with their relative length of service with the railway, as hereinafter provided." It would strain the language of the agreement to define the limited lay-offs complained of in this claim as reductions in force.

The Referee is unable to find in the agreement, or in the circumstances surrounding its adoption, convincing evidence to support the contention that seasonal end-of-month and one-day lay-offs, as covered in the instant claim, are in violation of either Rule 16 or 25. The strongest indication that these lay-offs are not in violation of the agreement is the fact that a previous rule which would have prevented them has been eliminated.

Because the record covers a period of depression, not too much force should be given to arguments having to do with past practice, however, there is no specific evidence to indicate that end-of-month and one-day lay-offs, as covered in this claim, are in conflict with past practice. If they are not violations of the agreement, they can scarcely be defined as constituting changes in rates of pay or working conditions.

In the absence of evidence of specific violation, or of departure from past practice under the agreement, the Referee is not disposed, in view of past decisions, to cover this case in under the sections of the amended Railway Labor Act, to which reference was made above.

AWARD

The circumstances of this case include items that are peculiar to the properties to which the case applies. This award is made exclusively with reference to these particular facts and circumstances. On the basis of the special facts brought out in this record the referee holds and the Third Division finds that—

(a) The contention that rules 16 and 25 were violated by the lay-offs from October 25 to November 1, 1934, inclusive, and by the one day a week lay-off effective November 17, 1934, as set forth in the claim and in arguments thereon is not sustained.

(b) Reimbursement for wage loss suffered during the period covered by the claim is denied.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 14th day of August 1936.