Award Number 320
Docket Number MW-346

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

Robert G. Corwin, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
READING COMPANY

DISPUTE.—

"Restoration of full monthly rate for Maintenance of Way Foremen and reimbursement for wage loss suffered by them as result of Carrier's violation of Rule 39 of the Agreement between the Brotherhood and the Reading Company, effective January 15, 1936."

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 notice of hearing thereon.

An agreement bearing effective date of January 15, 1936, is in effect between the parties.

The case being deadlocked, Robert G. Corwin was appointed as Referee to sit with the Division as a member thereof.

On January 15, 1936, the Reading Company and the Brotherhood of Maintenance of Way Employes entered into a new agreement. Previously the foremen advancing this claim had occupied excepted positions. It appears from the evidence that it was their wish to be included within the collective bargain of the Brotherhood and in deference thereto a new article numbered 39 was inserted. This reads as follows:

> "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 and on the following holidays: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving, and Christmas, 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 Sunday and the holidays specified above shall be paid therefor on the basis provided in these rules, in addition to the monthly rate."

The proceedings leading up to final negotiation of the new agreement were protracted and their stenographic report occupies much of the record in the present submission. From this we glean that the carrier contended the foremen would not enjoy as advantageous opportunities as formerly, the officers of the company announcing that if the rule went into effect they would only be paid for days actually worked in connection with the gangs under them, the rate to be calculated by dividing their former pay by the number of work days in the month. To this the Brotherhood did not agree and Article 39 was adopted without a meeting of minds as to its interpretation.

Such being the case, it is incumbent on the Division to interpret the rule as its wording must warrant. It is practically identical with others which prevail throughout the country. Universally, insofar as we can find, they have been

construed as intending to provide a flat monthly wage for the foremen who occupy positions within their provisions, a salary which includes compensation for services rendered in a supervisory capacity and responsibilities requiring the same in excess of the working hours or days assigned for the regular force. The operating rules require a considerable amount of services of this sort. Of these the foremen were not relieved and compensation therefor, as shown by the exhibits, has been expressly denied. The carrier contends that a monthly rate means a basic rate, not a flat monthly rate or salary, and that if it takes the old monthly rate and divides it by the days worked with the force it has complied with the rule. With its contention we cannot agree. The article itself, particularly when read in connection with the one immediately preceding it, seems to plainly imply that a regular monthly salary shall be fixed, and such a construction is consistent with that which has always been given it.

The new rule, however, gave the foremen certain advantages which they had previously not enjoyed and subjected them to certain new disadvantages. To apply the old flat rate at present would be tantamount to creating a new rate or modifying an old one, which is beyond the province of the Adjustment Board and this Division.

It is our opinion, therefore, that the adoption of the rule called for the establishing of a flat monthly rate of pay or salary for the foremen involved, to be effective as of the date of the adoption of the rule, and that in not doing so the latter has been violated.

AWARD

Claim sustained to the extent that the management by negotiation and as provided by law shall establish a flat monthly rate of pay to the petitioning foremen as of January 15, 1936, and reimburse them on the basis thereof and in compliance with the rules of the schedule of that date, which may relieve the Carrier of payment in full.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 19th day of October, 1936.

DISSENT

The award in this dispute does not pass upon nor decide the question presented to the Third Division. The question in dispute as stated by the employees ex parte in their "Statement of Claim" is:

> "Restoration of full monthly rate for Maintenance of Way Foremen and reimbursement for wage loss suffered by them as result of Carrier's violation of Rule 39 of the Agreement between the Brotherhood and the Reading Company, effective January 15, 1936."

The contention of the employees, supported by the evidence and the argument which they submitted, was limited to the claim that under Rule 39 the management could not lay off the foremen, who are paid a monthly rate for all services rendered, when they laid off the men and reduce the foremen's rate proportionately therefor, and have asserted throughout the record that these men have a monthly rate—their grievance being that they have been denied a part of that monthly rate. They direct particular attention to the exhibits of the carrier as establishing the fact that these foremen are paid monthly rates and to the fact that the carrier has not denied nor attempted to deny that they are monthly rated employees.

The carrier has contended throughout that these foremen are on a monthly rate and that the record of negotiations resulting in the adoption of Rule 39 shows that the term "monthly rate" as included in the rule meant a monthly rate from which proportionate deductions would be made for the days when the foremen did not work. The carrier introduced the terms "basic" and "flat" monthly rates to distinguish the former as being that which the rule contemplated, and the latter as being that which the rule did not prescribe and that which it gave the representatives of the employees to understand during the negotiations would not be comprehended by the rule.

It is thus apparent that the parties are not in disagreement as to whether or not there exists a monthly rate, but simply as to whether or not the rule

(rule 39), as it was negotiated and as it exists in the agreement, contemplated that a deduction could be made therefrom for the days when the foremen do not work.

The award, however, through a series of findings, we perceive to be in error, proceeds to a last finding that the adoption of the rule called for the establishing of a flat monthly rate and that in not doing so the rule has been violated.

Such finding that a rule has been violated by failure of the parties to take an action precedent to the negotiation of such rule or at least concurrent therewith we conceive to be capricious. That finding is evidently based on a preceding finding in the award which states that the rule is "practically identical with others which prevail throughout the country" and that "universally insofar as we can find they have been construed as intending to provide a flat monthly wage for the foremen who occupy positions within their provisions, etc."

That finding also is one based on hypothesis and assumption not supported by the facts relating to the rule as they appear in the agreements of other carriers throughout the country, and certainly not as covered by the evidence submitted in the record in this case. The employees in the record did give a summary relating to 79 railroads out of 82 included in a survey which they had conducted. This record showed that, at least in respect to seven of those roads, the employees themselves admitted that foremen were required to lay off and lose time on days when men in gangs were laid off, though in most of such cases the employees contended they were protesting such action. That survey was made by the employees to develop the fact that the same rule as Rule 39 or a rule similar and identical in purpose prevailed on those 79 roads and the foremen were receiving their full monthly rate.

What the survey did not purport to show and what it did not disclose was whether or not there were in the agreements in effect on those roads other rule or rules guaranteeing to the foremen not less than a full working period. It is of record before this Third Division in dispute on at least one of the roads listed among the 79 included in the survey that their agreement with the M. of W. organization in addition to the rule similar to Rule 39 has a rule guaranteeing just that which is being contended for in this case, reading:

"ARTICLE 8—ESTABLISHED HOURS

"(a) Regularly established daily working hours will not be reduced below eight (8) and six (6) days per week to avoid making force reductions."

It is not of record either in this dispute nor in the files of the Third Division just how many other roads have similar guarantee rules nor how many of these 79 roads may have practices which do not give rise to the question involved in this dispute, or have supplementary agreements or understandings which have eliminated the question of lay-offs for foremen without involving interpretation of their rule similar to Rule 39 in this dispute. Certainly this record, even accepting in full the presentation of the employees as to the practice on these 79 roads, does not justify the finding that universally a flat monthly rate has been intended.

Such finding also is in flat contradiction of a preceding award by this division which involved this identical rule and contained findings bearing directly upon its application under circumstances of exact analogy to those in the instant dispute. See Award No. 290, Docket No. MW-160.

Therein the foremen were laid off along with the men in the gangs under the circumstances of layoffs of one day per week as well as a continuous period of seven working days at the end of a month, and a violation of their Rule 16 of identical wording of Rule 39 in this dispute was charged. The claim there also charged violation of their seniority Rule 25. The award found neither rule was violated by seasonal end-of-month and one-day lay-offs and the claim for wage loss was denied.

The findings in that award constitute express denial of the finding in the instant award that the "adoption of the rule called for the establishing of a flat monthly rate of pay—and that in not doing so the latter has been violated." The findings in Award No. 290 on that rule were:

"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.

"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.

* * * * *

"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. * * *

"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."

The above reference to a previous rule which had been eliminated from their agreement was a rule similar to a rule in the Reading agreement, viz, Rule 42, which reads:

"Gangs will not be laid off for short periods when proper reduction of expenses can be accomplished by first laying off the junior men. This will not operate against men in the same gang dividing time."

That rule was not brought into the instant dispute by either party nor is it mentioned or relied upon by the Referee in making the award to which dissent is here registered. Reference to its omission from the agreement involved in Award No. 290 as being of strongest indication of the virtue of the finding that the agreement there had not been violated does in no wise detract from the findings otherwise above quoted in that case that their Rule 16 of exact wording to Rule 39 in this case contains no "guarantee of a full month's pay." Reference to its omission there was as stated in support of a conclusion theretofore arrived at. In the instant dispute, likewise, neither its inclusion in the agreement nor omission of reference to it have any bearing on the proper and correct interpretation of Rule 39 as not guaranteeing a full month's pay. In any event, the surest evidence that Rule 42 in the instant case does not prevent the carrier from deducting from the pay of the foremen for days when they are laid off along with their men is that the employees have not relied upon it nor even mentioned it as giving such protection. Rule 16 did not guarantee a full month's pay in Award No. 290; Rule 39 of identical wording does not guarantee a full month's pay in the instant dispute.

"Guarantee of a full month's pay" as referred to in Award No. 290 is of exactly the same meaning as "establishing of a flat monthly rate" in the present award in this case. The findings of Award No. 290 were that a guarantee of a full month's pay, that is, the establishment of a flat monthly rate, was not contained in the rule that had the exact words of Rule 39 in this dispute.

The Honorable Referee in this dispute has expressed his reluctance to reverse other referees, and has commented to the effect that this Board should not be reversing itself, adding that if one former Referee had actually reversed another, that he in an instant dispute should follow the more recent decision. The referee may enunciate and follow any proper principle that he deems appropriate, but it is submitted that he has not followed the principle that he himself lays down in the award to which this dissent is registered. Award No. 290 is the most recent award bearing upon the identical rule under as near analogous circumstances as may be found in any case, and if precedent ever had probative and binding value it was existent here.

No playing with words nor confusing suggested future remedial actions as are implied in the final words of the award relating to "compliance with the rules of the schedule of that date, which may relieve the carrier of payment in full" will serve to becloud the evasion of obligation to decide the question propounded in the statement of claim in this dispute. The confusion of this award lies in the order to establish a flat monthly rate and in the same

unbroken phrase suggest relief from payment by compliance with the rules of the schedule, one of which only is here involved and which has heretofore been declared in positive terms by Referee Willard E. Hotchkiss in Award No. 290 to relieve the carrier from any guarantee of a full month's pay or its equivalent—the establishment of a flat monthly rate, and accordingly from any payment or reimbursement under this the only rule of the schedule alleged to have been violated.

Such an indeterminate and indecisive award is indeed whimsical in character, impossible of practical application, and only provocative of continuing or additional dispute—all of which are in controversion of the ends to be served by the enactment of the law under which the National Railroad Adjustment Board is constituted and of the duties and obligations thereunder imposed upon it.

(Signed) C. C. COOK.

The undersigned concur in the above dissent:

L. O. MURDOCK.
R. H. ALLISON.
GEO. H. DUGAN.
A. H. JONES.