Award Number 372
Docket Number MW-374

NATIONAL RAILROAD ADJUSTMENT BOARD
Third Division

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO GREAT WESTERN RAILROAD COMPANY

STATEMENT OF CLAIM.—

"That in assigning its sectionmen, bridge and building mechanics and helpers to five days per week the Carrier is violating Article 5, Section L of current agreement effective February 15, 1925, and request these employes be assigned to six days per week instead of five and paid for time lost on account of being required to work five days per week."

STATEMENT OF FACTS.—The following statement of facts was jointly certified by the parties:

"The Chicago Great Western Railroad has during the period January 1930 to 1934, inclusive, assigned section gangs and mechanics and helpers in bridge and building gangs to work 5 days per week seasonally. Since January 1, 1935, these employes have been assigned to 5 days per week regularly. Instructions are issued on the first day each month advising them the day of the week they will not be required to work. The Committee representing these employes contend this in violation of Section L, Article V, of the Agreement with the Carrier, effective February 15, 1925, reading as follows:

"'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.'"

It should be noted that the above statement of facts displaced, by agreement of the parties, the joint statement of facts originally submitted, which read as follows:

"The Chicago Great Western Railroad has, since January 1933, assigned section gangs and mechanics and helpers in bridge and building gangs to work 8 hours per day, 5 days per week. Instructions are issued on the first day of each month, advising them the day of the week they will not be required to work. * * *" [The remainder of the statement is identical with that subsequently substituted.]

The original joint statement of facts is here included solely for the purpose of rendering understandable such references to the facts as are contained in the respective positions of the employees and the carrier, which were based upon the original joint statement; there was no contention by either party, however, that the changes introduced in the certified facts altered in any way the rules or principles applicable to the disposition of this dispute.

The agreement between the parties bearing effective date of February 15, 1925, and containing Section L of Article V as cited above was placed in evidence.

POSITION OF EMPLOYES.—The contentions of the employes were stated as follows:

"We maintain that by assigning employes involved to five days or less each week, or not permitting them to work full time, which is equivalent to requiring them to lay off one or more days each week, the carrier is violating above quoted rule. The rule specifically provides that gangs will

not be laid off for short periods when proper reduction of expenses can be accomplished by first laying off junior men. Wherever the employes are not permitted to work full time, but are required to lose one or more days each week, it must be very clear that in fact gangs are being laid off for short periods each week.

"Let us analyze the rule. When it was negotiated its makers no doubt anticipated that times would come when it would be necessary to make reduction in expenses and so this rule was written to provide that when such time comes such reduction, or curtailment of expenses, would not be accomplished by laying off the entire gang for any short period but that rather the necessary savings must be accomplished by laying off the junior men. It has been repeatedly alleged by the carrier in connection with this dispute that its only reason for working its hourly rated B. & B. and section forces five or less days per week is the necessity of making necessary saving in expenditures, a saving that under the rule should be accomplished by laying off junior employes rather than requiring the entire gang, senior and junior employes alike, to work part time.

"When the current agreement with the rule quoted was negotiated in 1925 and up until January of 1933 section and bridge and building employes were working full time, 8 hours per day, 6 days per week. Thus it must be very clear that this rule was not written to authorize short time assignments but, as we maintain, rather to prevent regular assignments of less than 6 days per week. Again when the present wage scales were negotiated, fixing certain hourly compensations, all employes were working full time, 8 hours per day, 6 days per week, as regular assignments and, of course, the negotiators had in mind the weekly and monthly earnings the hourly rates would produce on the basis of the full time assignment then prevailing. Thus when assignment is curtailed and employes are required to lay off one or more days each week, the contemplated earning is, of course, upset. On this road the going rate for section laborers is 35¢ per hour. Where they are permitted to work regularly 6 days per week, their monthly earning reaches approximately $71.00 per month. Where under the present arrangement they are required to lay off one or more days per week, their monthly earning runs approximately $14.00 per week, or around $56, $57 per month, a rate of pay less than that paid to relief workers.

"The main objective of any man rendering service to an employer is to earn a livelihood. In order to, as far as possible, assure a livelihood, employes have sought and obtained rules to the effect that the men longest in the service shall be given preference of employment, in other words, that their seniority rights be respected and protected. In fact, the real intent of all rules governing seniority, force reduction and employment is that the senior employes shall be given preference over junior employes. Under the prevailing practice of this carrier, where it requires the entire gang to lay off one or more days each week or (as the carrier insists upon terming it) assigns them to five or less days per week, a man with only one month's seniority rights is given the same consideration as a man with twenty years' seniority rights. Under such arrangement seniority rights do not mean anything to an employe, which in itself is unfair and contrary to agreement in effect.

"As stated, the sole principle involved in this dispute is that instead of allotting available employment to the senior employes by permitting them to work full time, the carrier, without regards to seniority rights, is requiring entire gangs to lose one or more days each week. We maintain that Article V, Section (1), was written into the agreement to prevent such practice. We, therefore, respectfully request of this Board that it direct the compliance of this rule to the end that employes in question be regularly assigned to 8 hours per day, 6 days per week, and further that employes who have suffered monetary loss, because of improper application of this rule, be reimbursed for lost time."

POSITION OF CARRIER.—The contentions of the carrier were stated as follows:

"It has been the policy of the Carrier since January 1, 1933, to work regular section gangs and mechanics and helpers in bridge and building gangs, 8 hours per day and 5 days per week, the number of men employed depending upon the volume of work to be performed, and the number is

increased or decreased according to the needs of the service, which is strictly in compliance with agreement. The Committee is contending, under the rule quoted in the joint statement of facts, that the Carrier is required to work these men 6 days per week. The Carrier contends that the rule quoted in joint statement of facts is not applicable and has no bearing whatsoever upon the claim of employees that the Carrier work them 6 days per week, unless in its judgment the service requires full 6 days per week. In some cases the carrier has worked certain gangs 6 days per week. This is done, however, only at certain points when of necessity their service is required. It is not the practice of the Carrier to lay off all or any of the gangs for short periods for the purpose of reducing expenses. When necessary to reduce the forces the junior employes are laid off.

"It is the contention of the Carrier that there are no rules in the agreement with maintenance of way employees that prevent it from working these employees 8 hours per day and 5 days per week. It further contends that there is no violation of the contract and the rule quoted in statement of facts has no bearing on the subject matter in dispute. Section L, Article 5, page 12 of Maintenance of Way Employees' Agreement is applicable only in cases when the Carrier lays off gangs for short periods and at no time has the Carrier attempted to do this. Therefore, it cannot be said that the rule quoted in statement of facts has been in any way violated by the Carrier, regardless of the contention of the Committee that under this rule section gangs and mechanics and helpers in bridge and building gangs are entitled to work 6 days per week and 8 hours per day, and particularly in view of the fact that there is no rule in their contract guaranteeing these employees any specific number of days work per week."

OPINION OF BOARD.—There can be little question that Section L of Article V was designed to cover, and in fact does cover by its express terms, such situations as are here disclosed of record. With the wisdom of the policy of reducing forces by laying off junior men in preference to laying off gangs as a whole for short periods this Board has no concern; but the parties appear to have definitely agreed upon such a policy, when reduction in expenses were to be effected, and departures from this policy constitute violations of the agreement.

It is true that there is no guarantee of a six-day work-week in the agreement, and the employes cannot insist as of right, independently of the provisions of Section L of Article V, upon six days of work per week. Insofar, however, as a six-day work-week did in fact prevail prior to the practice here complained of, resorted to in the interest of reducing expenses, gangs have been laid off without reference to whether the same result could be accomplished by first laying off junior men, in contravention of the terms of the agreement. Furthermore, it is altogether reasonable to assume that the prevailing wage rates were negotiated on the basis of the prevailing six-day work-week, except insofar as it might properly be relaxed under Section L of Article V; and there is also much justification for the contention that the practice complained of, particularly when it leads, as it has, to the employment of numerous extra men, often on a six-day work-week basis, while existing employes are restricted to a five-day work-week, tends to neutralize and destroy the preferential rights of senior employes guaranteed by the seniority provisions of the agreement.

There also appears to be no doubt that the substitution of a five-day for a six-day work-week constitutes the laying off of gangs for short periods. The carrier has referred to no standard of what constitutes a short-period lay-off which would exclude the lay-offs here involved. It contends that the five-day work-week is merely part of its budgeting plan for the handling of maintenance-of-way work, and it claims the right to assign its maintenance-of-way workers to as few days labor per week, without downward limit, as this budgeting plan may require. This is but another way of saying that the laying off of gangs as a whole, without reference to the prior laying off of junior employes, becomes entirely proper and not in conflict with the terms of the agreement if only such policy is planned in advance. There is nothing in the agreement, or in the prerogatives of management, to support such a view. The carrier's right to reduce expenses and to adopt budgeting plans in furtherance thereof is not questioned; but these policies must be effectuated without contravening the obligations assumed by the carrier under the terms of the agreement.

But while it has been amply established that the practice here complained of constitutes a violation of Section L of Article V of the agreement, the record

is altogether wanting in evidence by means of which the extent of past violations or of future relief can be measured. It must be kept in mind that neither the obligation imposed upon the carrier to lay off junior men nor the prohibition against its laying off gangs for short periods is an absolute one. It is required first to lay off junior men only when proper reduction of expenses can be accomplished by this method; and the laying off of gangs for short periods is prohibited only when proper reduction of expenses can be accomplished by first laying off junior men. As a practical matter, proper reduction of expenses can conceivably be accomplished by either one of these procedures, or by a combination of the two. The carrier has resorted exclusively to the laying off of gangs for short periods, in total disregard of the possibility of accomplishing the same result through laying off junior men, and this has been found to constitute a violation of the agreement. The employes, on the other hand, assume that the laying off of junior men would necessarily effect proper reduction of expenses, and hence they seek compensation for all time lost by virtue of past requirements of a five-day work-week and request that the employes involved be assigned for the future to a six-day work-week. Whether the contemplated results could have been accomplished or can now be accomplished exclusively by the laying off of junior men depends upon circumstances concerning which the record is entirely silent. Since the size of gangs and the character of work required of them inevitably vary from place to place and from time to time, depending upon physical and operating conditions, the feasibility of effecting reduction of expenses solely by laying off junior men, without thereby preventing proper performance of the tasks involved, must be grounded in a consideration of numerous and complicated factors, concerning which no evidence has been submitted, rather than in mere assumption; and even if this assumption were justified, the difficulty would still remain of determining what portion of the total group of employes is entitled to past damages or future relief. While the Board recognizes that the employes are entitled to past damages and future relief, there appears to be no evidence of record on the basis of which it can now determine the measure of such damages or relief.

Under these circumstances, the fact of violation of the agreement and the right to damages and relief being established, the parties must be directed to negotiate a settlement of the remaining issues—that is, of the amount to be paid for time lost and of the extent to which the six-day work-week shall be restored—or, failing agreement, to resubmit these issues to the Board on a record adequate for their sound and just determination.

FINDINGS.—The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon and upon the whole record and all the evidence, finds and holds:

That the carrier and the employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein;

That Section L, Article V, of the prevailing agreement is being violated and that the complainants are entitled to past damages and future relief; and

That there is no evidence of record on the basis of which the Board can determine the measure of past damages or of future relief.

AWARD

Claim sustained, to the extent that it is herein found that the carrier is violating Section L, Article V, of the agreement, and that the employes are entitled to past damages and future relief. In conformity with the above findings and the opinion of the Board upon which they are based, the parties are directed to negotiate a settlement of the amount to be paid for time lost and of the extent to which the six-day work-week shall be restored, or, failing agreement, to resubmit these issues to the Board on a record adequate for their sound and just determination.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: H. A. JOHNSON
Secretary

Dated at Chicago, Illinois, this 12th day of February, 1937