

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Frank M. Swacker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of E. A. Sturman, R. G. Miller, E. E. Jenkins, J. Stewart, and W. R. Jones, who are employed as blacksmiths, welders and helpers on the Western District of the Missouri Pacific Railroad, for all time lost at their respective rates between December 23, 1937 and January 2, 1938, account of being laid off by the Carrier in violation of the agreement between the Carrier and Employees, effective January 1, 1928."

EMPLOYEES' STATEMENT OF FACTS: "All Maintenance of way blacksmiths, welders and helpers on Western Seniority District of the Missouri Pacific Railroad were laid off on December 23, 1937 and called back effective January 2, 1938, which caused them to lose all of the time between these dates, including Sundays and holidays, they being monthly rated employees, paid a monthly rate to cover all services rendered, such monthly salaries being based on the same hourly rate as hourly rated employees of the same classification. The total amount of such monthly rates being arrived at by adding together the actual number of hours constituting the regular week day assignment, eight hours per day, for the full number of days in the year, and multiplying that total number of hours by the hourly rate paid hourly rated employees on the same classification."

POSITION OF EMPLOYEES: "The employees contend that inasmuch as all employees named in this submission are monthly rated employees, paid a monthly rate to cover all services rendered, and in no case being paid overtime, regardless of whether such overtime be worked on Sundays, holidays or beyond the actual number of hours constituting the regular week day assignment, and such monthly rate being arrived at by adding together the actual number of hours constituting the regular week day assignment, eight hours per day, for the actual number of days in the year, and then multiplying that number of hours by the hourly rate paid hourly rated employees of the same classification, then they are paid on the basis of eight hours per day for the actual number of days in the year, and further, that the positions they held before December 22, 1937 were not abolished and they were not placed back in the service on January 2nd, 1938 on new positions, but they were laid off between the dates in question. These employees further contend that inasmuch as they are not paid for any overtime, as are the hourly rated employees of the same classification, and as they were available, ready and willing to perform any service on each of these dates that they may have been called upon to perform, that the carrier had no right to lay them off and deduct from their pay checks the amounts they would have been paid had this lay-off not taken place. Therefore the employees request your Honorable Board to render a decision in favor of the employees, allowing

or favor two of the nine blacksmiths who were laid off and three of the blacksmith helpers who were laid off contending (quoting from General Chairman Hudson's various letters):

'States he was laid off on December 23rd up to and including January 2nd, through no fault of his own, and inasmuch as he is a monthly paid man receiving a monthly rate for all services rendered, his salary being based on eight hours per day for the calendar dates of each year, he believes the company had no right to ask him to lose this time, and is asking that he be paid for the time December 23rd to January 3rd.'

"The employees have cited no rule nor established practices under any schedule rule to support their contention.

"As stated by the Carrier in its Statement of Facts above, these positions were abolished as of December 23, 1937 and re-established commencing January 3, 1938.

"The carrier's right to reduce force when done with due regard to its schedule rules, as was done in this instance, is a matter in which the employees have no voice, other than that the reductions be made in conformity with its schedule rules with the employees. The only rule having any bearing upon this question is that quoted in Carrier's Statement of Facts, viz:

'Rule 3-(a) When force is reduced, the senior man in the sub-department, on the seniority district, capable of doing the work, shall be retained.'

"These employees are on a separate and independent seniority roster, hence when all positions in the seniority district within which this class of employees held seniority were abolished, the employees could not exercise their rights over junior employees and were, as a matter of fairness, permitted to return to the position they held as of December 23rd when said positions were re-established commencing January 3rd.

"There are no rules of our wage agreement nor practices thereunder that would require the carrier to maintain certain positions whether said position be paid monthly, hourly or daily rates.

"In the absence of a schedule rule as between the carrier and its employees or a well established practice thereunder to support the employees contentions in this case, same should be properly denied by your Honorable Board."

OPINION OF BOARD: The question in this case is as to the propriety of the carrier laying off for a few days of the month, regularly monthly rated employees not paid overtime for work outside their fixed hours and being required to be available at all times during the month whenever their services might be required, and according them only pro rata pay for the days preceding the lay-off.

This question has twice been considered by this Division of the Board, Awards 290 and 320, and opposing conclusions reached.

In the first case, though the general rule of law applicable to the effect that such could not be done was recognized, the conclusion was reached in the particular circumstances there involved that it could properly be done. The decision does not explain what the governing circumstances were, whether a certain change in the rules there involved or certain claimed acquiescence. Award 320 reaches the opposite conclusion and to the extent it conflicts with the earlier award must be deemed to have overruled it.

Both those cases, as well as the instant one, were argued on the question of the presence or absence of any particular provision in the schedule.

In the absence of any governing provision in the schedule, the question is one of general law. In that respect it is well established by overwhelming authority that a hiring at a stipulated rate of pay for a term, will, in the absence of contrary evidence, be deemed to be a hiring for the term; thus a hiring at a weekly rate, a hiring for a week; at a monthly rate, for a month; at an annual rate, for a year. It is no more necessary for the employees to show a rule prohibiting the practice than it would be to show one providing they should not be paid in scrip. On the contrary it would be for the carrier to show a rule authorizing its course.

The agreement between the parties is for the employees to be available to perform such work as might be demanded of them and for the carrier to pay them a stipulated sum per month; the former performed their part, the latter has not.

"Monthly guaranties" referred to in the discussion has no proper place in it; properly used that term generally refers to a minimum payment to employees whose wages are computed on some other unit basis.

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 employees involved in this dispute, are respectively carrier and employees 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, and

That the carrier violated the wage agreement.

AWARD

Claim sustained to the extent claimants were not paid full monthly salaries.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of November, 1938.