

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

I. L. Sharfman, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
FORT WORTH AND DENVER CITY RAILWAY

STATEMENT OF CLAIM: "Claim of Section Foreman G. W. McNeely, and section laborers R. P. Atkinson, E. H. Canada, and V. C. Armstrong, Goodlett, Texas, that they be paid eight hours at the rate of time and one-half on January 1st and 2nd, 1938, on which dates they were instructed by both the roadmaster and the track supervisor to remain at their headquarters ready for service."

EMPLOYES' STATEMENT OF FACTS: "On December 31, 1937, Section Foreman G. W. McNeely, Goodlett, Texas, received instructions from his Roadmaster to the effect that he, McNeely, and the three laborers employed in his crew must remain at the section headquarters on January 1st and January 2nd, 1938, ready for immediate service on account of that the Carrier was to operate several special (football) trains.

"An agreement bearing date of January 16th, 1929 is in effect between the parties which by reference is made a part of this Statement of Facts."

POSITION OF EMPLOYES: "Schedule Rule 8 of Agreement in effect between the Carrier and the Brotherhood reads as follows:

'Sunday and Holiday Service. . . . Work performed on Sundays and the following legal holidays—namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation or by proclamation, shall be considered a holiday)—shall be paid at the rate of time and one-half, except that employees necessary to the continuous operation of train yards; camp cooks and camp attendants; bridge, highway-crossing and tunnel watchmen; signalmen at railroad non-interlocked crossings; lampmen, bridge tenders pumpers and track walkers; who are regularly assigned to work on Sundays and holidays, or employees who work in place of those regularly assigned, will be compensated on the same basis as on week days.

'Sunday and holiday work will be required only when absolutely essential to the continuous operation of the railroad.'

"As stated in Employee's Statement of Facts, Section Foreman McNeely received instructions from his Roadmaster that he and his men must remain at the section headquarters ready for immediate service on January 1st and 2nd, 1938. Being held for service is, we maintain, equivalent to that of rendering service or working. Schedule Rule 8 above quoted provides that work performed on Sundays and the holidays named in that Rule will be paid for

formance of work. A railroad's roadway is a stationary thing, a plant, and the maintenance of it is that kind of work which the employes cannot pick up and take away with them. To be of any good whatever to the Carrier employes engaged in this class of work must be on or near the property. It is an intensely practical situation. To describe it in another fashion, can anyone imagine a condition where on a properly managed railroad all its maintenance of way employes are simultaneously permitted to go considerable distances away, with whereabouts unknown, on a given Sunday or holiday, or, in other words, a complete desertion of the railroad by the entire complement of maintenance force? The answer is No! This truth is recognized in Rule 6 of Rules and Instructions Governing Maintenance of Way and Structures on this railroad, which reads: 'In case of danger to Company property employes must unite to protect it.'

"In letter of February 3, 1939 from General Manager of Carrier to General Chairman of Brotherhood there appears this statement: 'This claim bears evidence of having been born of pique.' There is sufficient in this record to justify the conclusion that there was resentment on the part of the foreman when he filed the claim for two days pay at the rate of time and one half or the equivalent of three days at pro rata rates because there was any interference, however slight, with any of his activities on January 1 and 2. This is shown by his predetermination to make the claim, by his continuation of the program through the day of January 2nd although the last north-bound train had left Goodlett section by 8:15 A. M. that date, and by his not setting up some sort of a permissive arrangement for Laborers Atkinson, Armstrong and Canada for the balance of the day of January 2nd although he did not hesitate to exercise his authority and supervisory judgment as a foreman on the previous day, January 1st, when he permitted Laborer Green to go to a point 53 miles distant. It is inconceivable that this experienced foreman did not know that all of these passenger trains had cleared his section and that rush was over by the early morning of January 2nd.'

OPINION OF BOARD: No rule of the Agreement has been cited by the carrier which imposes upon the employes involved herein the obligation, when off duty, of holding themselves available for service at all times at their place of employment. This obligation would infringe seriously upon the freedom of the employes; if such an obligation exists, without provision for additional compensation, it must be found in some express stipulation of the Agreement governing the working conditions of these employes and not simply be assumed as a general conditioning requirement of their employment contract. The rule dealing with week-end visits, which is referred to by the carrier, covers special situations not involved in this proceeding and cannot be construed as clothing the carrier with the general right of holding employes for service. The carrier also places considerable stress, as an evidence of its practice, upon certain operating rules applicable to maintenance-of-way employes. But these rules too, which are entirely unilateral in their origin and were promulgated a number of years subsequent to the negotiation of the Agreement, impose no such obligation. One of these rules, in addition to requiring that employes shall not absent themselves from actual duty without permission, merely specifies that they must leave their address with the proper officer or head of department and must give prompt notice of any change of address; and the other rule merely specifies that heads of departments and foremen, when away from their headquarters, must keep their division office advised of their whereabouts. The express words of these rules negative the assumption that the employes may, within the unlimited discretion of the carrier, be held for duty without compensation. In this case there was no mere request that the employes involved inform the carrier as to where they may be reached; these employes were officially instructed to hold themselves available for duty during the two-day period covered by the claim. Since they were thus held for duty in line with their regular assignments, they are entitled to such compensation as they would have earned if they had actually performed the work in contemplation; and

since they were thus held for duty on a Sunday and a holiday, they are entitled to compensation under the rule governing service on such days. This conclusion applies to the foreman as well as to the section laborers, since the special requirement here imposed upon the foreman clearly went beyond the incidental situations covered by the general rule governing the compensation of supervisory employees.

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 employees involved were held for duty and are entitled to compensation as requested.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 10th day of May, 1940.