Award No. 5213

Docket No. MW-5184

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Hubert Wyckoff, Referee.

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MISSOURI PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) That the Carrier violated the agreement when they failed to employ the Crossing Watchmen at Convent and Rutger Streets, St. Louis, Missouri on September 5, 1949 and November 24, 1949;

(2) That the Crossing Watchmen deprived of the right to work on the days and at the locations referred to in part (1) of this claim, be paid at their time and one-half rate of pay for each day they were improperly laid off.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1949 the Crossing Watchmen at Convent and Rutger Streets, St. Louis, Missouri were assigned to work 6 days per week. As a result of the 40 Hour Week Agreement signed at St. Louis, Missouri on the 16th day of July, 1949, this 6 day per week assignment was reduced to 5 days per week, effective September 1, 1949.

On Labor Day, September 5, 1949 and on Thanksgiving Day, November 24, 1949, the Crossing Watchmen at Convent Street and Rutger Street were laid off and as a result, they worked only 32 hours in these two respective weeks.

The Crossing Watchmen assigned to the positions at Rutger and Convent Streets are paid a monthly rate, such rate being based on 169⅓ hours per month.

Claim was filed with the Carrier, requesting that the Crossing Watchmen at Convent and Rutger Streets be paid at their respective time and one-half rates for 8 hours each on September 5 and November 24, 1949, account of not being permitted to perform 40 hours work during the two weeks referred to.

Claim was declined.

The agreement in effect between the two parties to this dispute, dated July 1, 1938, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

For the information and convenience of your Board we are quoting below paragraph (d) of Rule 15, which reads as follows:

> "(d) Nothing herein shall require that any position shall be filled 7 days per week nor shall constitute a guarantee of any certain number of days per week, nor change existing rules with respect to guarantees."

As has been shown above, however, when the 40-hour work week was made effective, the formula was reduced to 169⅓ hours per month, which did not include holidays, and that is the number of hours now comprehended in monthly rates paid to crossing watchmen on this property.

Rule 16 of the Memorandum Agreement effective September 1, 1949, providing for 169⅓ hours of service comprehended in the regularly established monthly rate of compensation, standing alone, is conclusive proof that holidays are not a part of the hours comprehended in the monthly rate and does not, therefore, constitute a guarantee.

As has also been pointed out to your Board, should there be any doubt of the meaning of the language employed in the Chicago Agreement of March 19, 1949, ARTICLE II, Section 3 (f) of that agreement clearly states that such language does not constitute a guarantee where none existed prior thereto.

All matters contained in the claim as presented on the property have been discussed in conference or correspondence between the parties thereto.

This claim is wholly without merit, without support under the effective argeement and is contrary to the interpretation and practice on the property by both parties to this dispute. It should, therefore, be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimants who were monthly rated employes, were laid off on two holidays (Labor Day September 5, 1949 and Thanksgiving November 24, 1949) and as a consequence worked 32 instead of 40 hours. They were paid their full monthly rate but claim that they were entitled to work the holidays at the rate of time and one-half. It is conceded by all hands that the monthly rate was calculated in such a way as not to include pay for a holiday not worked. Therefore, if the claims are good, the claimants are entitled to time and one-half.

The claimants rely on Rule 14 Section 2 (b) but this rule is no more than a guarantee in aid of seniority for it is by its terms limited to prevent reductions in assignments "to avoid making force reductions" and so is not applicable here (Award 5074). The main reliance is upon Rule 16, the history of which it is necessary to consider.

1. The 1938 Agreement dated June 23, 1938 effective July 1, 1938.

The prototype of Rule 16 was Rule 16 (a) of the 1938 Agreement which contained no formula for computing hourly and monthly rates but did contain a specific weekly guarantee as follows:

> "The hours of employes covered by this rule shall not be reduced below 8 hours per day for 6 days per week."

2. Special Decision MW-113 dated December 29, 1944 (effective December 16, 1944).

Recognizing that the terms of the "Chicago Agreement" dated October 21, 1944 (effective December 16, 1944) required certain changes in the rules relating to "Sunday and Holiday Work, Overtime, Calls and Absorbing Over-

time," the 1938 Agreement was amended accordingly by Special Decision MW-113 in the following particulars pertinent here:

(1) The 6 day guarantee above quoted was eliminated.

(2) With this elimination, Rule 16 (a) as amended reads as follows:

> "Rule 16 (a) Positions not requiring continuous manual labor, such as camp cooks and camp attendants, track, tunnel, bridge and highway crossing watchmen, flagmen at railway non-interlocked crossings, lampmen and pumpers, will be paid a monthly rate, which monthly rate shall comprehend not less than eight (8) hours service per day for 6 days per week and shall be based on 208⅔ or 243⅓ hours per month subject to provisions of Rule 15."

Therefore, effective December 16, 1944, the monthly rates of crossing watchmen and the other employes named in Rule 16 (a) were made uniform to "comprehend not less than 8 hours' service per day for 6 days per week" and were said to be "based on 208⅔ or 243⅓ hours per month subject to provisions of Rule 15."

Also effective December 16, 1944, Rule 15 was amended to provide for a gradual transition from a 7 day week basis (243⅓ hours) to a 6 day week basis (208⅔) hours as 7 day positions became vacant after December 16, 1944. Rule 15 was also amended to add:

> "(d) Nothing herein shall require that any position shall be filled 7 days per week nor shall constitute a guarantee of any certain number of days per week, nor change existing rules with respect to guarantees."

The monthly rates so established included pay for the 7 holidays named in Rule 15 at pro rata rates. Thus, if no service was required on a holiday, the crossing watchman was paid his full monthly rate which included pay at the pro rata rate for the holiday not worked. And if he was required to work the holiday, he was paid 4 pro rata hours in addition to his monthly rate.

Thus, Special Decision MW-113 both eliminated and expressly denied any guarantee of any certain number of days per week; but in effect the Decision guaranteed these monthly rated employes 6 days per week pay by fixing their monthly rates at 208⅔ hours or 243⅓ hours which included pay at the pro rata rate for holidays not worked.

It is of particular significance to note, however, that the elimination of the 6 day guarantee from the Agreement left nothing but a formula for determining hourly rates.

We therefore find nothing in the 1938 Agreement as revised by Special Decision MW-113 which would guarantee these monthly rated employes the right to work a holiday and receive 4 pro rata hours' pay in addition to their monthly rate. And such is the nature, if not the extent, of the claims made here.

3. The "Chicago Agreement" dated March 19, 1949 (effective September 1, 1949).

This Agreement established the 40-hour week for these employes. So far as pertinent here, it provided:

> **"Article II, Section 2 (b)** ('Earnings Provisions')
>
> Effective September 1, 1949, basic monthly rates, exclusive of the general increase of seven cents per hour effective October 1, 1948, shall be adjusted by dividing such rate by the equivalent number of straight time hours comprehended by such rate so as to determine the equivalent straight time hourly rate. The equivalent straight time hourly rate shall be multiplied by 204 and to

such rate there shall be added the seven cents per hour provided for by Article I in the manner provided by that Article using the hours then comprehended in the rate which shall become the basic monthly rate effective September 1, 1949, for a month of 169⅓ hours.

Thereafter, to determine the straight time hourly rate, divide the monthly rate by 169⅓ or the weekly rate by 40. To determine the daily rate multiply the straight time hourly rate by eight."

"**Article II, Section 3** ('Miscellaneous')

(f) **Guarantees**—All existing weekly and monthly guarantees shall be reduced to five days per week. Nothing in this Agreement shall be construed to create a guarantee of any number of hours or days of work where none now exists.

(g) **Holidays**—Existing provisions relating to pay for holidays shall remain unchanged."

4. The Memorandum of Understanding dated July 16, 1949, effective September 1, 1949.

Recognizing that the "Chicago Agreement" dated March 19, 1949 (effective September 1, 1949) required certain changes in the rules, Rule 16 of the 1938 Agreement as revised by Special Decision MW-113 was amended to read as follows:

"Rule 16. Positions not requiring continuous manual labor, such as camp cooks and camp attendants, track, tunnel, bridge and highway crossing watchmen, flagmen at railway non-interlocked crossings, lamp men and pumpers, will be paid a monthly rate, which monthly rate shall comprehend not less than eight (8) hours' service per day for five (5) days per week and shall be based on 169⅓ hours per month."

This new rule appears to be contradictory on its face, because a monthly rate "based on 169⅓ hours" comprehends the exclusion of 2 rest days per week and 7 holidays per year, whereas a monthly rate which "shall comprehend 8 hours service per day for 5 days per week" would have to be based on 174, not 169⅓ hours. The predecessor Rule 16 is perfectly consistent in this respect: what the monthly rate was said to "comprehend" and what it was said to be "based on" were identical—6 days' pay which equals 208⅔ hours. The apparent contradiction in the present rule can be resolved only by either consulting the Chicago Agreement or by assessing the weight of what the monthly rate was said to "comprehend" against what it was said to be "based on".

It is a familiar principle of the construction of agreements that the specific controls the general. This would indicate that greater weight should be attached to the specific figure "169⅓ hours" than to the general statement that "not less than 8 hours' service per day for 5 days per week" was comprehended. Moreover, the general statement here is but a step in the formula by which the specific result is reached. So if the rule alone be consulted, usual canons of construction would lead to the conclusion that "169⅓ hours" is controlling.

And if we consult the Chicago Agreement, much the same conclusion is reached. It is true that both the Chicago Agreement and the Report and Recommendations of the Emergency Board give every indication of an intention to perpetuate existing arrangements with respect to holiday pay (see especially Article II, Section 3 (g)). But the Chicago Agreement also contains the very formula from which the calculation of 169⅓ hours was derived (Article II, Section 2 (b)).

In view of the foregoing considerations, we are unable to conclude that these monthly rates are properly based on 174 hours or that either the present Rule 16 or its predecessor guaranteed the right of these employes to work a holiday.

The claimants cite a number of awards to the effect that established practices are not abrogated by a new agreement unless they are inconsistent with it. Such awards are not material here. This is not a case of a practice but rather a case of performance under a rule which was changed by an amendment of the rule (see Award 5013).

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; and

That the Agreement has not been violated.

AWARD

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 7th day of February, 1951.