

Award No. 5225
Docket No. MW-5129

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Adolph E. Wenke, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOS ANGELES UNION PASSENGER TERMINAL (Southern Pacific Company—Pacific Lines, the Atchison, Topeka and Santa Fe Railway Company and the Union Pacific Railroad Company)

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

- (1) That the Carrier violated and continues to violate the provisions of the agreement effective September 1, 1926, when it required and assigned Special Agent Luis Gereaux to perform the service of Track Foreman Vito Carone on April 16, 1947;
- (2) That Track Foreman Vito Carone be compensated for two hours and forty minutes at his time and one-half rate, each evening, Sunday, holiday, and regular working day, retro-active to April 16, 1947.

EMPLOYES' STATEMENT OF FACTS: Mr. Vito Carone is assigned as Track Foreman at the Los Angeles Union Passenger Terminal. In his capacity as Track Foreman at this location, Mr. Carone is responsible for and required to keep time rolls for Sweepers employed in the Los Angeles Union Passenger Terminal.

Prior to April 16, 1947, Foreman Carone was allowed two "calls" on Sundays and Holidays. He also received a "call" on each regular working day. The purpose of these "calls" was to supervise the work performed by the Sweeper employees and to check their time both in and out.

Effective April 16, 1947, the Carrier issued the following instructions to Mr. Carone relative to his assignment:

"TRACK FOREMAN

Daily, except Sundays and Holidays	7:00 A.M. to 3:30 P.M.
Sundays	one call
Holidays	one call

You will not include in your time book on Sundays and Holidays, the sweepers reporting at 11:30 A. M. and 1:30 P. M."

On April 16, 1947, the Carrier assigned Special Agent Luis Gereaux who holds no position within the Scope of the Maintenance of Way Agree-

under the circumstances set forth therein. Rule 31 in effect during the entire period involved in this claim, sets forth the measure of compensation for certain employes when notified or called to perform work outside of the regular work period.

In the light of the explicit terms of Rule 43, supra, and the further fact that during the periods and on the days for which the claim in this docket is made the claimant was not called upon or required to perform work of the nature covered by the exception stipulated in said rule, the Terminal submits that no basis is present under Rules 27 or 31, or any other rule of the current agreement for the payment sought in this docket.

CONCLUSION

The Terminal asserts that it has conclusively established that the claim in this docket is without basis or merit, and therefore respectfully submits that it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The System Committee of the Brotherhood makes this claim in behalf of Track Foreman Vito Carone. It asks that he be compensated for two hours and forty minutes at time and one-half his regular rate, or a Call, for every evening, Sundays, holidays, and regular working days, beginning with April 16, 1947. The basis for the claim is that Carrier assigned to and required Special Agent Luis Gereaux to perform certain duties of the claimant's position.

Claimant, immediately prior to April 16, 1947, was Track Foreman in the Los Angeles Union Passenger Terminal operated by the Carrier since May 7, 1939 as agent for the Southern Pacific Company (Pacific Lines), Union Pacific Railroad Company, and The Atchison, Topeka and Santa Fe Railway Company—Coast Lines. Claimant, while an employe of the Southern Pacific, was being used in the Terminal within the quota of employes properly assignable to the Southern Pacific on the "cars used" basis. The regular assigned hours of claimant were from 7:00 A. M. to 3:30 P. M., Monday through Saturday, with Sunday his day off. However, Carrier regularly called claimant every evening of his regular work days and twice on Sundays and holidays. This came about as the result of Carrier using a number of sweepers in the Terminal, employes under the Maintenance of Way Agreement, whose work was being supervised by claimant.

Most of the sweepers held assignments the hours of which were the same as those of claimant. Claimant checked their time in and out and gave them such supervision as was necessary. Sweeper assignments were seven day positions so claimant was regularly called on Sundays and holidays to check them in and get them started. However, the assignments of two of the sweeper positions was such that they went off work at 8:00 and 10:00 P. M. respectively. Thus, if Carrier wanted claimant to supervise their work and check them out it was necessary to call him back every evening, Sundays, holidays and work days. This, up to April 16, 1947, the Carrier had been doing. However, commencing April 16, 1947 it made a change. Thereafter it only called claimant on Sunday and holiday mornings. In the evening of the regular work days Carrier had some clerical employe take the time of these two sweepers. In the evenings, on Sundays and holidays, it had its Special Agent, an employe not under the Maintenance of Way Agreement, observe them and check them out. This arrangement continued until March 20, 1949. On that date Carrier began the use of a time clock it had installed. Thereafter the Special Agent was no longer required to observe these sweepers and check their time but the two sweepers were required to use this time clock to check out on every evening, Sundays, holidays and work days.

A further change took place after September 1, 1949 when the forty-hour week went into effect. The claimant's regular assignment was then reduced to five days, Mondays through Fridays, with Saturdays and Sundays as

his relief days. Commencing with Saturday, September 3, 1949, the Terminal Engineer supervised the sweepers on Saturdays. However, the effect of this change cannot be considered here as the form of the claim does not cover it.

It was within the province of the Carrier to determine the amount of supervision needed of these two sweepers in order to properly expedite their work. If it decided no supervision thereof was necessary and, as a result thereof, only clerical work formerly performed by the foreman remained it could be assigned to clerks. See Award 4992 of this Division. Keeping and preparing the time roll of these sweepers, when all supervision thereof was discontinued, was purely clerical work and was properly assignable to such employees. Therefore Carrier did not violate the Agreement or any evening of a regular work day of the claimant's assignment on and after April 16, 1947. Neither did it do so on any evening on Sundays and holidays after the time clock was installed and put into operation on March 20, 1949.

A different situation exists with reference to Sundays and holidays between April 16, 1947 and March 20, 1949 during which time Carrier had its Special Agent observe and check out these two sweepers. While Carrier claims that what the Special Agent did was not supervisory in character, we have come to a different conclusion. We find some of the things he did were supervisory in character. A Carrier may not assign to and have performed by others not under an agreement the work embraced within the scope thereof, that is, work covered by an agreement cannot be performed by employees not covered by the same agreement. Carrier was obligated, if it wanted the work of these two sweepers supervised, to have it done by someone under a Maintenance of Way Agreement who was qualified to do it.

But even so Carrier contends that claimant would not be entitled to be paid because if he had performed these duties, if they are responsibilities and/or supervisory duties of his position, they would be covered by his monthly rate of pay under Rule 43 of the parties' Agreement with the Southern Pacific effective September 1, 1926.

Rule 43 is as follows:

"Employees whose responsibilities and/or supervisory duties require service in excess of the working hours or days assigned for the regular force will be compensated on a monthly rate to cover all services rendered except that when such employees are required to perform work which is not a part of their responsibilities or supervisory duties on Sundays or the designated holidays, 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."

However, we do not find it necessary to answer Carrier's contention in this regard because, for a long time prior to April 16, 1947, Carrier did not treat the duties claimant performed in supervising these sweepers such that they came within the responsibilities and supervisory duties for which his monthly rate of pay fully compensated. In fact, Carrier has always treated them as duties which were not a part of his responsibilities or supervisory duties as a Track Foreman, which his monthly compensation covered, by paying him on the basis of a Call whenever it had him perform such duties on Sundays, holidays or on the evenings of days of his regular assignment. We think this properly reflects the kind and nature of these duties.

On Sundays and holidays, between April 16, 1947 and March 20, 1949, we find Carrier violated the parties' Agreement by assigning the supervisory work to an employee not under a Maintenance of Way Agreement and that the claim for a "Call" on these days on behalf of claimant, who was qualified to perform these duties, is properly made. However, in all other respects the claim is denied.

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 Agreement.

AWARD

Claim sustained for a "Call" on all Sundays and holidays between April 16, 1947 and March 20, 1949 but otherwise denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 20th day of February, 1951.