Award No. 5440
Docket No. MW-5473

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

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

(1) The Carrier violated the effective agreement when it failed to properly compensate Track Laborers W. A. Ebner, C. Kaiser and J. Lofkin for services performed on September 7, 8, 9, 10 and 11, 1948;

(2) Track Laborers C. Kaiser and W. A. Ebner be compensated for the difference between what they did receive at their straight time rate of pay and what they should have received at their time and one-half rate of pay for 30 minutes each day, September 7, 8, 9, 10 and 11, 1948, and in addition be compensated at their straight time rate of pay for one and one-half hours on each of the same dates;

(3) Track Laborer J. Lofkin be compensated at his straight time rate of pay for six and one-half hours each day, September 7, 8, 9, 10 and 11, 1948, and in addition be compensated for the difference in pay between what he did receive at his straight time rate and what he should have received at his time and one-half rate for six and one-half hours on each of the same dates.

EMPLOYES' STATEMENT OF FACTS: C. Kaiser, W. A. Ebner and John Lofkin are Track Laborers holding regular positions as such on Section SA-1, Lincoln, Nebraska.

During the Fair Week, between September 7, 1948 and September 11, 1948, it was necessary for the Carrier to provide additional crossing protection.

The Track Laborers referred to above, have a regular assigned work day with hours of 8:00 A. M. to 5:00 P. M. with one hour off for lunch.

From September 7, 1948 through September 11, 1948, Track Laborers C. Kaiser and W. A. Ebner had their assigned working hours changed from 8:00 A. M. through 5:00 P. M. to 7:30 A. M. through 3:30 P. M.

From September 7, 1948 through September 11, 1948, Track Laborer John Lofkin had his assigned working hours changed from 8:00 A. M. through 5:00 P. M. to 3:30 P. M. through 12:00 Midnight.

The facts and circumstances in this dispute are for all practical purposes identical to those prevailing in Award 4194, the only difference being that in this case the section laborers who were separated from their gang were used as "watchmen" while those involved in Award 4194 were used as "coal car cleaners."

In conclusion, the Carrier asserts that:

(1) The exceptions to paragraph (a) of Rule 33 as embodied in paragraphs (b), (c) and (d) thereof, were established through and under the processes of collective bargaining to permit flexibility in the designation of starting time to meet the requirements of the service.

(2) No distinction is made in the provisions of Rule 33 for changing starting time between gangs on the one hand and individual employes on the other hand.

(3) The starting times for two or more shifts were established in full and complete conformity with the provisions of Rule 33(c).

(4) Claimants were properly assigned and correctly compensated in conformity with the provisions of Rules 31, 33, 39(a), 40(c) and 44(a).

(5) The awards of the Third Division of the National Railroad Adjustment Board cited by the Carrier clearly and decisively support Carrier's position.

(6) With these irrefutable facts and circumstances present, Petitioner's claim is totally lacking in contractual substance and must, therefore, in all things be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: The claimants are track laborers, regularly assigned to positions on Section SA-1 at carrier's Lincoln, Nebraska terminal, working 8:00 A. M. to 5:00 P. M. with one hour off for lunch. On September 3, 1948, they were notified that effective September 5, 1948, their assigned hours would be changed in order that they might protect a much used railroad crossing during the time a fair was in progress. The hours assigned claimants Kaiser and Ebner were 7:30 A. M. to 3:30 P. M., while those assigned to claimant, Lofkin, were 3:30 P. M. to 11:30 P. M. From September 7 to September 11th, the two claimants first above named worked as Crossing Watchmen or Flagmen on the hours so assigned. Except for September 11, a date to which we shall presently refer, claimant Lofkin did likewise. Thereafter they were all returned to their regularly assigned positions. For the days they were off such positions, as above indicated, they were paid at the pro rata rate. Subsequently claim was filed on the property and denied.

At the outset the carrier insists the claim should be dismissed because it is not the same claim as was progressed on the property. The initial notice advised the carrier the claim was based on the premise the action in question was in violation of rules of the agreement and from its own letters of record it is clear it knew the claimants were claiming reparation substantially as here claimed. In the face of that situation the carrier's contention on this point is rejected as devoid of merit.

Although they mention others the principal rule of the Agreement, alleged by the employes to have been violated is Rule 33, which so far as it is pertinent to the issues here involved reads:

> "Rule 33. (a) When one shift day service is employed, the starting time will not be earlier than 6:00 A. M., and not later than 8:30 A. M., except as hereinafter provided, and will not be

changed without first giving employes affected thirty-six (36) hours notice.

(d) Nothing in this rule shall apply to positions which are not assigned to regular daily hours and the rates of which comprehend all service performed, including incidental overtime."

The employes also direct our attention to Rule 5 of the agreement providing that "Seniority rights of all employes shall be confined to the group of the sub-department in which employed" and point out that under Rule 2 of the same contract, relating to sub-departments, Section Gang Laborers are listed as "Group 1—Grade C" while crossing watchmen, gatemen and flagmen are listed as "Group 3—Grade A", thereby evidencing the involved employes when assigned to the work in question were working out of their recognized class.

So far as the merits of the dispute are concerned the gist of all contentions raised by the parties raises the single issue whether under the foregoing conditions and circumstances, conceding 36 hours notice was given of its intention, the carrier can temporarily change the hours of claimants as regularly assigned track laborers, require them to perform work for a period of just a few days as crossing watchmen or flagmen and then return them to their original positions without violating the provisions of Rule 33, above quoted.

The question thus raised is not new on this Board and we are not disposed to labor it at great length.

In Award 4151, involving a dispute with this same carrier and with the same rule in force and effect we held the rule was violated where the carrier removed two members of a section crew from their regular assignments for 5 days and required them to perform emergency work as crossing watchmen.

Except for the fact the claimants and carrier were not the same and the rule in question was differently worded, but nevertheless entitled to be given the same force and effect, the factual situation in Award 4744 was identical with the one now confronting us and we are unable to discern anything in that case to distinguish it from the present one. There we held that action of the carrier in changing the hours of regularly assigned trackmen and assigning them to protect a much used crossing during a fair for the few days of its duration was in violation of the Agreement.

The same holds true of our recent Award No. 5423 where we held a similar rule of the Agreement there involved was violated when the carrier changed the assigned hours of regularly assigned section laborers and required them to leave their regular positions and perform temporary service of flagging trains at an interlocking plant which was in process of repair.

The opinions of the three Awards last mentioned are well reasoned and sound in principle. They discuss at length the principles involved and the reasons responsible for the conclusions therein announced and cite Awards which sustain them. We are convinced the decisions reached in the three awards to which we have specifically referred should be upheld and adhered to. To deny the instant claim would result in overruling them. Therefore based on what is said and held in Awards Nos. 4151, 4744 and 5423 we hold the record in the instant case discloses the carrier's action was in violation of Rule 33 of the current Agreement.

We have not overlooked the fact that in an attempt to forestall the foregoing result the carrier places great weight on Award No. 4194, written by the same Referee that wrote the opinion in Award No. 4744. Careful analysis of the opinion in that case will reveal the two cases are readily distinguishable. In fact the Referee in question took occasion to carefully

point out, even though he was there holding the rule had not been violated, that where the change in the hours of assignments requires the occupants of regular positions to engage in temporary work of another class the spirit, intent and purpose of the Starting Time Rule is violated.

We now turn to the penalty to be imposed for the violation of the rule. Here again it would serve no useful purpose and merely burden our reports to spell out the reasons for our decision. It suffices to say we adhere to what was said and held with respect to such subject in the last paragraph of the Opinion of Award No. 5423 and hold the Carrier is required to compensate claimants for the time lost on their regularly assigned positions at the pro rata rate. This means the claim is sustained to the extent indicated for all dates in question. Claim 3 is sustained to that extent for September 7, 8, 9 and 10, 1948, and denied as to September 11th. The carrier asserts and the employes do not deny that claimant Lofkin was off duty on that day for reasons of his own. We can only assume that would have been true if he had been occupying his regularly assigned position.

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 Carrier violated the Agreement.

AWARD

Claim 1 sustained; Claims 2 and 3 sustained but only to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 6th day of September, 1951.