

Award No. 5581

. Docket No. MW-5490

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

SOUTHERN PACIFIC COMPANY (Pacific Lines)

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

(1) That the Carrier violated the effective agreement when it assigned Assistant Water Service Foreman Frank Constantine and R. Hoffman, Water Service Mechanics G. B. Stidd, James Duggan, Dean R. Mowray, Charles Naber, David B. Gifford, Fred D. McVey, and R. A. Hostetter, and Water Service Helper, Michael Cherry of Water Service Gang No. 8, Sacramento Division, to a Tuesday through Saturday work week with rest days of Sunday and Monday;

(2) That the above listed employes be compensated for the difference between what they received at their time and one-half rate of pay for all Saturday service rendered subsequent to September 1, 1949;

(3) That these employes be compensated at their straight time rate of pay for each Monday they have been denied the right to work, subsequent to September 1, 1949.

EMPLOYES' STATEMENT OF FACTS: Prior to September 1, 1949, the Carrier employed Water Service Gangs Nos. 8 and 9, on the Sacramento Division. These gangs were assigned to work 6 days per week, Monday through Saturday, with Sunday as their assigned rest day.

Effective September 1, 1949, the Carrier assigned Water Service Gang No. 9, to a five (5) day work week, Monday through Friday, with Saturday and Sunday as their assigned rest days.

Effective September 1, 1949, the Carrier assigned Water Service Gang No. 8, to a five day work week, Tuesday through Saturday, with Sunday and Monday as their assigned rest days.

The Employes contended that no operational problem existed which would justify the Tuesday through Saturday assignment for Water Service Gang No. 8. The Carrier contended that the assignment was justified.

Claim was filed in behalf of the employes, requesting that the listed individuals assigned to Gang No. 8, be paid the difference between what they did receive at their straight time rate of pay for service on Saturday, subsequent to September 1, 1949, and what they should have received at their time and one-half rate.

of time and one-half in the case of " * * * work in excess of 40 straight time hours in any work week, * * *" or in the case of " * * * employees worked more than five days in a work week * * *." It will be noted that time and one-half compensation is accorded only in the case of an employee working more than five days or more than 40 hours in a work week or in the case of an employee working on his assigned rest day. The claimants did not work more than five days or more than 40 hours in any work week, nor did they work on their assigned rest days; accordingly, even if there were any merit to the claim presented (which the carrier denies) claim for time and one-half on Saturday is not supported by the agreement and should be denied.

Item 3 of petitioner's statement of claim is as follows:

"(3) That these employees be compensated at their straight time rate of pay for each Monday they have been denied the right to work subsequent to September 1, 1949."

In view of the fact the claimants were not assigned to work on Monday, and have not subsequent to September 1, 1949 worked on that day, the carrier asserts that, in the absence of any provision in the current agreement requiring that the claimants should have been assigned to work on Monday, together with the fact that the current agreement contains neither a rule guaranteeing any specific number of working days for employees assigned to positions of assistant water service foreman, hourly rated positions of water service mechanic or hourly rated positions of water service helper, nor a rule which guarantees payment to the occupants of such positions for days not worked, there can be no basis for the payment sought on behalf of the claimants for work not performed on Mondays.

CONCLUSION

The carrier asserts that it has been conclusively established that the claim in this docket is without merit and therefore submits that it should be denied.

(Exhibits not reproduced)

OPINION OF BOARD: In effecting the 40-Hour Work-week on its Sacramento Division Carrier assigned Water Service Gang No. 8 to work Tuesday through Saturday and Water Service Gang No. 9 to work Monday through Friday. The Employees contend that Water Service Gang No. 8 positions are five-day positions and file claim as indicated. Carrier contends that the positions of Gangs No. 8 and No. 9 were six-day positions and that it staggered the work-weeks in accordance with operational requirements.

The current Agreement between the parties conforms to the National 40-Hour Week Agreement and contains the standard provisions. Those applicable to this dispute are as follows:

"Establishment of Shorter Work Week"

Note

The expressions 'positions' and 'work' used in this Memorandum of Agreement refer to service, duties, or operations necessary to be performed the specified number of days per week and not to the work week of individual employees. (Emphasis supplied.)

"General—

There will be established, effective September 1, 1949, for all employees, subject to the exceptions contained in this Rule, a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the operational requirements; so far as prac-

licable the days off shall be Saturday and Sunday. The foregoing work week rule is subject to the provisions of this Memorandum of Agreement which follow: (Emphasis supplied.)

"Five-day Positions—

On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday.

"Six-day Positions—

Where the nature of the work is such that employees will be needed six days each week, the rest days will be either Saturday and Sunday or Sunday and Monday." (Emphasis supplied.)

"Deviation from Monday-Friday Week—

If in positions or work extending over a period of five days per week, an operational problem arises which the carrier contends cannot be met under the provisions of the foregoing paragraph captioned 'Five-day Positions' and requires that some of such employees work Tuesday to Saturday instead of Monday to Friday, and the employees contend the contrary, and if the parties fail to agree thereon, then if the carrier nevertheless puts such assignments into effect, the dispute may be processed as a grievance or claim under the agreement."

In brief, the Employees' claim is based on their assertion that the work of the positions of Gang No. 8 is not performed on Mondays because Gang No. 9 is then occupied with the work of their own positions. Thus, they contend that if Saturday work on positions held by the members of Gang No. 8 is necessary because of an "operational problem" then the handling of such a situation is governed by the "deviation rule" cited above. Inasmuch as Carrier has effected the work schedules of Gangs No. 8 and No. 9 unilaterally the Employees contend the claim is valid.

Carrier contends that it has staggered the work weeks of the two gangs in accordance with its operational requirements as it is permitted to do under the paragraph entitled "General" and assigned rest days in accordance with the "Six-day position" rule.

It is apparent that the Carrier in the first instance should be the judge of its operational requirements. It necessarily follows that under the 40-Hour Week Agreement discretion with respect to staggering work weeks of forces engaged in work of a nature requiring six or seven day protection rests with the Carrier. It is also apparent that the Carrier's discretion in this respect is not absolute. It may not deprive employees of Saturday and Sunday as rest days on an arbitrary or capricious determination that the work is of such a nature that employees will be needed six or seven days per week. If the Carrier's determination in this respect is challenged by the Employees the burden is upon them to show that the operational requirements of the Carrier are not better met by having the work-weeks staggered. (See letter of February 27, 1948, from Members of Emergency Board to Carriers' Conference Committee and the Sixteen Cooperating Organizations involved in the preparation of the 40-Hour Week Agreement.)

While we believe the above principles are clearly discernible from the language of the 40-Hour Week Agreement, we have difficulty in applying them in this case because of the conflict of fact with respect to the nature of the work in which Gangs 8 and 9 are engaged during the six working days of the week. The Employees contend, in effect, that Gangs 8 and 9 operate as independent units doing essentially work of a different and unrelated nature. Although touching to an extent upon the work done by Gangs 8 and 9 during the week, Carrier devotes much of its submission to the importance and greater efficiency of having work done by Gang No. 8 on Saturdays. The latter, of course, is not the basis upon which the right to establish six-day

positions rests. The true test is whether or not both Gangs No. 8 and No. 9 are engaged in work of a nature where employees are needed six days per week. In a final submission Carrier furnishes some further evidence of the nature of the work performed by Gangs 8 and 9 on the six days of the week. The admission of this submission in this record is challenged by the employees because of the date and manner of its filing. Regardless of whether or not this submission be considered as part of the record, it is obvious that we cannot reach a decision on this claim on the present state of the record. The conflict of fact with respect to the nature of the work performed by Gangs 8 and 9 in the work-week is too sharp and there is no manner in which we can resolve it whether we take the disputed submission as part of the record or not. The claim will, therefore, be remanded to the property for further negotiation and in the event of a failure to reach agreement for the furnishing of a joint check to this Board showing the distribution of labor performed by Gangs 8 and 9 during their work weeks for whatever period of time prior to the date of filing this claim the parties can agree upon as being representative of the normal operation.

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 this claim should be remanded to the property as indicated in Opinion of the Board.

AWARD

Claim remanded as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 14th day of December, 1951.