

Award No. 10496

Docket No. MW-8816

NATIONAL RAILROAD ADJUSTMENT BOARD

**THIRD DIVISION
(Supplemental)**

Frank J. Dugan, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ELGIN, JOLIET AND EASTERN RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it instructed and required certain Night Assistant Track Foremen and Machine Operators at Gary, Indiana and South Chicago, Illinois to suspend work during and throughout their respective assigned work periods on September 6, 1954;

(2) Each employe adversely affected by the aforesaid violation be reimbursed for the exact amount of monetary loss suffered thereby.

EMPLOYES' STATEMENT OF FACTS: Claimants Nick Marikus, William Sanger, B. Labene, P. Sklengeric, and P. Polyush were regularly assigned to the position of Night Assistant Track Foreman at Gary, Indiana and South Chicago, Illinois. Similarly, Claimants A. C. Sedita and Tom Condon were regularly assigned to the position of Night Roadway Machine Operator at Gary, Indiana.

Each of the aforementioned positions are considered and recognized as seven-day positions which are necessary to the continuous operation of the Carrier, with relief positions established to furnish relief on the rest days thereof.

On Labor Day, September 6, 1954, the Carrier instructed and required the Claimants to suspend work during and throughout their respective assigned work periods on that date.

The Agreement violation was protested and a claim filed in behalf of the Claimants.

Claim was declined as well as all subsequent appeals.

The Agreement in effect between the two parties to this dispute dated December 1, 1945, together with supplements, amendments, and interpretations thereto are by reference made a part of this Statement of Facts.

3. The Board has supported the Carrier's position in numerous awards which have considered the same circumstances under similar rules.

4. The fact that certain bulletins did not mention specifically that positions would not be worked on designated holidays is not cause under the agreement for the Organization to receive a sustaining award.

All material data included herein have been discussed with the Organization either in conference or in correspondence.

OPINION OF BOARD: The issue presented here is whether the Carrier under the Agreement the Forty-Hour a Week Agreement and collateral agreements may blank a holiday on a seven day position.

The usual rule to be applied in regard to blanking of holidays is well stated by this Board in Award No. 7294 which holds:

"The Organization contends that Claimants were regularly assigned by the Superintendent of the Carrier to work on holidays on their regularly assigned hours. This is a correct reflection of the record. We point out that Rule 27 (b) contains an exception in the following words: ' * * * excepting that this number may be reduced in a week in which holidays occur by the number of such holidays, * * *.' Whether the assigned work week is fixed by agreement or by bulletin, the Carrier under the foregoing rule may blank the holiday with impunity at any time. Awards 5668, 6385, 7033, 7134, 7136, 7137. A holiday within a work week creates an exception to the five-day work week rule. It may be blanked in whole or in part, or it may be blanked and the occupant given a call to perform the necessary work. This holding is supported by the language of Rules 25 (e) and 26 (b) which state in effect that an employee required to work on a holiday shall be paid at the rate of time-and-one-half with a minimum allowance of two hours. There is no basis for the contention that an employee used on a holiday is entitled to work eight hours at the pro rata rate. Awards 7033, 7136. He is entitled to eight hours pay at the pro rata rate if he does not work on a holiday, and he is entitled to time-and-one-half for the time worked, in addition thereto, with a minimum allowance of two hours. The rules governing work on holidays are special and controlling."

However, the instant case does not involve the usual situation. Here the Carrier prior to the instant claim took a different position. On September 8, 1949 the Chief Engineer of the Carrier on September 8, 1949 took the following position:

"Dear Sir:

"I have your letter of September 2, 1949, in which you inquire as to the reason that the monthly rates for Night Assistant Track Foremen on the Gary Division are computed on a different basis than other monthly rated employees on the Gary and Joliet Divisions.

"Prior to September 1, 1949, monthly rates for Night Assistant Track Foremen, Gary Division, were based on 313 days per year (365 minus 52) while the rates of other monthly rated employees were based on 306 days per year (365 minus 52 minus 7). The reason for

this was that these Night Assistant Track Foremen were assigned to work on holidays while other monthly rated positions were not. The monthly rates for these Night Assistant Track Foreman positions included pay for these holidays at time and one-half.

"On September 1, 1949, rates of Night Assistant Track Foremen, Gary Division, were based on 261 days per year (365 minus 104). 261 days are equivalent to 2,088 hours per year or 174 hours per month. At the present time the rates of other monthly rated employees are based on 254 days per year (365 minus 104 minus 7). 254 days are equivalent to 2,032 hours per year or 169½ hours per month.

"There is, therefore, no discrepancy between the two rates and the only reason for the two bases of computation is that Night Assistant Track Foremen, Gary Division, are assigned to work on the seven designated holidays and other monthly rated positions are not.

"I hope that this answers the questions raised in your letter of September 2, 1949, but if it does not, will you kindly advise.

"Yours truly

/s/ F. G. Campbell
Chief Engineer"

FGG:BHS

Again on January 10, 1952 the Carrier's Chief Engineer stated in reply to an inquiry from the Organization:

"The hourly rates of pay listed for our night assistant track foremen on the Gary Division are based on an assignment of 261 days a year, or five days a week, including holidays, for which time and a half is paid. As you will recall, each of these positions carried with it a requirement that the incumbent work each of his assigned days whether it falls on a holiday or not."

These unqualified admissions by the Carrier in writing show that it has consistently on this property taken the view that it was required that Claimants work their assigned days "whether it falls on a holiday or not." Carrier has not denied this was the case.

The numerous decisions of the Second Division holding that an oral agreement cannot vary the terms of the agreement are not relevant here for here the Carrier has unequivocally stated its position in writing.

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 Agreement was violated.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 30th day of March 1962.