

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

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

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

(1) The Carrier violated the effective Agreement, when, on November 9, 1959, it established and filled a position of Track Foreman and a number of positions of Track Laborers at Gary, Indiana, with assigned hours from 11:00 P.M. to 7:30 A.M., for the sole purpose of avoiding the application of the overtime rules.

(2) Track Foreman A. Hilbrich and Track Laborers A. McMillan, N. Morikis, D. Villagram, A. L. Ware, D. Chavez, A. Lopez, J. Gasper, M. Csernak, S. Hatfield and S. Ogmenovski each be allowed pay at his respective straight time rate for all time each was withheld from his regular assigned position since November 9, 1959.

EMPLOYES' STATEMENT OF FACTS: Throughout the years, the Carrier has maintained track gangs, consisting of a foreman or foremen and a number of track laborers, to perform track work and other work incidental thereto. Without exception, all of such gangs, including the section gang at the Mill Yard, Gary, Indiana, have heretofore been assigned exclusively to day service. In emergencies, the employees assigned to such gangs have been called and used to perform overtime service in accordance with Agreement rules.

Despite this historical application of the Agreement rules, the Carrier, effective November 9, 1961, established a position of Track Foreman and a number of positions of Track Laborer, to which the Claimants were assigned, at its Mill Yard, Gary, Indiana, with assigned hours from 11:00 P.M. to 7:30 A.M., thereby creating a night section gang at this location.

The Employees have contended and continue to contend that the Carrier's action in establishing said positions and gang was for the sole purpose of avoiding the application of the overtime rules.

The 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 is by reference made a part of this Statement of Facts.

service requirements and the corresponding overtime pay for his day shift forces at Gary Mill. He then suggested and advanced an alternative proposal, but he endeavored to remain consistent and attempted to tie it in with his argument that the new shift should have been negotiated. He suggested that he would withdraw his objections to the disputed 11:00 P.M. to 7:30 A.M. shift if the Carrier would agree to heretofore non-existent rules. He wanted a shift wage rate differential and a rule providing for limitations on the number of Maintenance of Way Subdepartment track gangs employed on new shifts. The Carrier declined this suggested settlement and pointed out that the progression of time claims and grievances was not the proper manner by which to acquire new rules, and that the BMWWE's course of action is governed by Section 6 of the Railway Labor Act. Obviously, the BMWWE's General Chairman would not have advanced this alternative proposal if he really thought there was merit in his primary argument, for his suggested alternative disposition of these time claims is inconsistent with the contract right theory under which they have been progressed.

There is no semblance of merit in this claim; and it should be denied in its entirety. As far as a money award is concerned, there is nothing in the record which shows the claimants suffered any actual pecuniary loss as required by the last paragraph of Rule 62.

(Exhibits not reproduced.)

OPINION OF BOARD: On November 9, 1959, Carrier established an additional night shift Section Track Maintenance Gang at the United States Steel plant in Gary, Indiana. This Gang was assigned to work the second trick, 11:00 P.M. to 7:30 A.M. on a five-day operation.

The Brotherhood makes claim on behalf of Track Foreman A. Hilbrich and ten track laborers that Carrier violated the Agreement by establishing this new Gang unilaterally for the sole purpose of avoiding the application of the overtime rules. It relies upon Rule 25 (c) and 59 (c) to support its position. Rule 25 (c), it points out, prohibits Carrier from changing regularly assigned hours to avoid the application of overtime rules. According to the Brotherhood, Rule 25 (c) was incorporated in the Agreement for the purpose of preventing Carrier from making day to day changes of an employee's regularly assigned hours to minimize punitive payments for overtime hours worked. The Brotherhood further urges that the establishment of a night section gang must be by agreement in accordance with the requirements of Rule 59 (c) which provides as follows:

"All questions pertaining to rates of pay, rules and working conditions, including seniority, arising under this agreement shall be matters of negotiation between the officials of the Elgin, Joliet and Eastern Railway and the duly authorized representatives of the Brotherhood of Maintenance of Way Employees or their duly accredited representatives."

The Brotherhood argues that in the past Carrier recognized the necessity for negotiation and agreement with Organization prior to the establishment of new shifts. It cites examples of such negotiations before the addition of shifts, namely, to improve a bridge on one occasion; to restore a storage tank on another occasion; and to step up production during the Korean war. In addition, the Brotherhood alleges that the establishment of a regular night section gang is contrary to any previous experience in the history of Carrier's operation.

In its rejection of the claim Carrier asserts that nothing in the Agreement prohibits it from establishing the positions of the new gang and consequently, its action did not violate any rule of the Agreement. It flatly denies that its sole purpose was to avoid the application of the overtime rule.

First, we will consider whether the creation of a new shift was "for the sole purpose of avoiding the application of the overtime rules." In studying the question of the intent of Carrier, we find no reason to doubt Carrier's good faith. The installation of new equipment at the Gary Mill to shorten production time resulted in a demand for more efficient and timely service from Carrier. The requirement for better track maintenance and construction scheduling led Carrier to form a new shift to satisfy these service demands. Carrier elected a night shift in preference to overtime because of considerations of greater efficiency, safety standards, and the continuous need for the services of these track laborers. Moreover, there is no proof that Carrier found it more economical to employ a second shift in preference to the use of day employes on an overtime basis. In fact, it is difficult to believe that Carrier would be so extravagant as to create a second shift when it only needed workers for occasional or periodic overtime services.

Rule 59 (c) relates to negotiation of questions pertaining to rates of pay, rules, and working conditions. The establishment of an additional shift did not involve any of these matters. It did not result in a reduction of forces or in a change of working conditions. It may have lessened the employes' opportunity for overtime, but there is nothing in the Agreement which says that the day shift of Maintenance of Way forces have an absolute, unrestricted right to overtime work. Because Carrier never employed a night shift at Gary Mill is not a reason for assuming that the creation of such a shift resulted in changes in the working conditions or hours of the already employed day shift.

The instances the Brotherhood cites to support its position, that the traditional practice was to negotiate before instituting a new shift, involved special or emergency situations affecting changes in the hours and working conditions of the employes. For example, when a bridge was to be placed as an overpass over Foss Park Avenue at North Chicago, it was necessary to construct a "shoo-fly" for rail traffic until the bridge was completed. Carrier wished to use two shifts around the clock, each working twelve hours. This proposal involved modification in hours of work and other working conditions. Negotiation, therefore, was required in accordance with the rule. Moreover, there is evidence in the record that Carrier on a number of occasions created and abolished night shifts in the Maintenance of Way craft at Gary and other locations without negotiation.

It should be noted that the exhibits presented by the Brotherhood with respect to the correspondence as to past practice were not introduced on the property and, therefore, cannot be considered at this time.

Establishment of the night shift involved, according to Organization, a change in the assigned hours and, therefore, was violative of Rule 25 (c) which prohibits change in the employes' regular assigned hours to avoid the application of overtime rules. This part of the rule must be considered in relation to the other provisions of Rule 25. Paragraph (b) of this rule contemplates the establishment of more than one shift, for it refers to a situation when "two or more shifts are employed." Thus, Rule 25 is authority for Carrier's right to establish the second shift. The starting time of the day

shift was not altered by the inception of the right shift. The employees on whose behalf the claim was filed were not members of the normal day shift — the record indicates that they were on furlough. They, thus, had no regular starting time and, therefore, there was no change in their assignment with respect to time. We conclude Rule 25 does not sustain Claimant's contention. The claim is without merit.

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

The Agreement of the parties was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of December 1964.