

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20207
Docket Number MW-20029

Irving T. Bergman, Referee

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company
((Lake Region)

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

(1) The Carrier violated the Agreement when it established new positions and assigned Carl L. Keifer and Shelly Thomas to work on Section 17 (A) the following hours of service as section laborers: 7:30 AM to 4:00 PM Saturdays through Wednesdays with rest days on Thursdays and Fridays. Claimant Carl L. Keifer worked said position April 7, 1971 through April 24, 1971 and Shelly Thomas worked said position April 7, 1971 thru April 27, 1971 (System File MW-BVE-71-9).

(2) The Carrier violated the Agreement when it established new positions and assigned E. E. Coates, George Davis and J. Dunbar to work on Section 17(A) the following hours of service as section Laborer, 7:30 AM to 4:00 PM Wednesdays thru Sundays with rest days on Mondays and Tuesdays. Claimant E. E. Coates and George Davis work said positions April 7 thru April 28, 1971 and J. Dunbar worked said position April 7, 1971 thru April 12, 1971.

(3) The Carrier violated the Agreement when it established new positions and assigned Felix Delis and Santos Diaz to work on Section 17(A) the following hours of service as section laborers, 7:30 AM to 4:00 PM., Saturdays thru Wednesdays with rest days on Thursdays and Fridays. Claimant Felix Delis began working said position on April 28, 1971 and Santos Diaz began working said position on April 27, 1971.

(4) The Carrier violated the Agreement when it established new positions and assigned James DeValle, Santiago Chapparro and Epifanio Lopez to work on Section 17(A) the following hours of service as section Laborers, 7:30 AM to 4:00 PM Wednesdays thru Sundays with rest days on Mondays and Tuesdays. Claimants DeValle, Chapparro and Lopez began working said positions on April 28, 1971.

(5) That the Carrier pay Section Laborers Carl L. Kiefer and Shelly Thomas the difference between what they received at their straight-time rates of pay and what they should have received at their time and one-half rates of pay for all Saturdays and Sundays that they rendered service following April 7, 1971 and at straight-time rate for all time lost on all Thursdays and Fridays following April 7, 1971 up to April 27, 1971 because of the violation referred to in part one (1) of this claim.

(6) That the Carrier pay Section Laborers E. E. Coates, George Davis and **J. Dunbar** the difference between what they received at their straight-time rates of pay and what they should have received at their time and one-half rates of pay for all Saturdays and Sundays that they rendered service following April 7, 1971 and at straight-time rate for all time lost on all Mondays and Tuesdays following April 7, 1971 up to April 28, 1971 because of the violation referred to in part two (2) of this claim.

(7) That the Carrier pay Section Laborers Felix Delis and **Santos Diaz** the difference between what they received at their straight-time rate of pay and what they should have received at their time and one-half rates of pay for all Saturdays and Sundays that they rendered service following April 27, 1971 and at straight-time rate for all **time** lost on all Thursdays and Fridays following April 27, 1971 up to the date Carrier has corrected the violation referred to in part three (3) of this claim.

(8) That the Carrier pay Section Laborers James **DeValle**, Santiago Chapparro and Epifanio Lopes the difference between what they received at their straight-time rates of pay and what they should have received at their time and one-half rates of pay for **all** Saturdays and Sundays that they rendered service following April 28, 1971 and at straight-time rate for all time lost on all Mondays and Tuesdays following April 28, 1971 up to the date Carrier has corrected the violation referred to in part four (4) of this claim.

OPINION OF BOARD: This dispute arises from the needs of an operation at the Carrier's South **Lorain** Yard where the principal industry **served** is the National Tube Division of the United States Steel Corporation. Steel pipe produced at this Location requires the use of gondola cars of particular length which must be free of debris when the pipe is Loaded. The Carrier established a section gang at this point, Monday through Friday, the principal duty of which was to clean the cars for the Tube Mill. In 1968 the pipe business increased to the **extent** that the Mill loaded cars on a seven day basis. Because there was not available a sufficient number of the cars which were needed, the cars had to be cleaned more frequently than could be done on a five day **Monday** through Friday operation resulting in cars being cleaned seven days a week. To resolve this problem, in May 1968 the Carrier established seven day positions with rest days on other than Saturday and Sunday. This continued until September 1970 when the pipe business decreased and seven day positions were no longer required. The Organization filed a **claim** at that time which **is** identical to the claim filed in this case. After September 1970, the **employees** who had been affected by the change to a seven day operation were returned to a five day operation, **Monday** through Friday.

In March 1971, allegedly for the same reason and based on the same factual situation, the Carrier again abolished the five day positions and established seven day positions. This time the seven day positions continued until July 1971 when the Carrier restored the five day positions Monday through Friday, allegedly for the same reason as in the first case. The Organization filed the identical claim as in the first case. As in the first case, the Organization has argued that the Carrier may not unilaterally change from five to seven day positions, Rule 24(g), thereby depriving claimants of the punitive rate of pay for working on their rest days. This time the Organization has argued, in addition, that there is no authority in the **Agreement** to make such change for the short duration of approximately three months.

When the change was made in March 1971, the claim submitted in the first case was still pending. It is referred to in the claim letter from the General Chairman dated May '26, 1971 in this case, as a claim based on the same facts pending before Public Law Board 249. The pending claim was decided on December 31, 1971 as Public Law Board 249, Award No. 13. It was held, with Lloyd H. Sailer, Chairman, as follows: "Carrier having shown sufficient need to establish **seven-day** positions, its action in doing so was within Fts proper managerial discretion."

Following the decision in PLB 249, Award 13, the Organization stated in a letter to Carrier's Vice President of Personnel dated August 18, 1972 that the second case was **not similar** to the first case because of the shorter period of time in the second case. This was in answer to the Carrier's letter dated February 14, 1972 in which the Carrier denied the **claim** in this case because, "in all its essential elements", it was **similar** to the first claim.

The Organization also argued that work other than cleaning the required cats was performed on Saturdays and on Sundays between **March** and July 1971. The record in the claim before **PLB 249** is **set** forth in the present record. It shows that the same **argument** was made and considered in the first case. The Organization's contention that the cars could have been cleaned in five days was also made and considered in the first case.

The Organization has not presented evidence that the Carrier intended to establish seven day positions for a **short** period of time; nor does the record contain any evidence to show that the Carrier could have **known** that the Tube **Mill's** requirements would have been of shorter duration in 1971 **than** it was in 1968. There is no proof to support the Organization's assertion that the change was made to deprive **employees** of overtime pay.

Awards 6502 and 6695 submitted by the Organization present lengthy discussions of the effect of the change to a 40 hour week following the National Agreement. The decisions reached in those Awards are not appropriate to the facts of this case except that the opinion includes the possibility that a 7-day position at straight time pay could exist when necessary. Award 7370, on different facts, concluded that there was no evidence of changed conditions to warrant any seven day assignment. Likewise, in Award 17593 it was held that a seven day position was prohibited, "absent a showing - - of a material change of operational requirements by the Carrier."

Awards 18504 and 18505 as in this case involved Saturday and Sunday rest day cleaning of cars and track work which the Carrier claimed was necessary, to justify changing the **employees'** rest days, because of a shortage of cars. The Award held that: "- - the Carrier did, in fact, properly exercise its managerial prerogative through approaching a managerial problem that existed by establishment of seven-day positions."

We have examined the Rules of the Agreement and find no prohibition against the Carrier's acts on the facts of this case nor do we find differences in this case sufficient to justify a different conclusion than that reached by PLB 249 in Award 13.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 did not violate the Agreement.

A W A R D

Claims denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 11th day of April 1974.