Award Number 222
Docket Number MW-200

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY

Dispute.—

"Claim of certain section foremen and section men on the Madison Division of the Chicago, Milwaukee, St. Paul, and Pacific Railroad for payment on the basis of eight (8) hours per day for each day that they were improperly assigned to four (4) hours per day between the period April 23, 1933, and June 12, 1933."

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

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Lloyd K. Garrison was called in as Referee to sit with the Division as a member thereof.

An agreement bearing date of October 1, 1926, is in effect between the parties, and the following rules were in effect at the time of the alleged improper assignment of work:

"RULES 4 (A), 4 (E), AND 4 (F)

"(a) For work requiring continuous application, eight (8) hours, exclusive of the meal period, shall constitute a day.

For eight (8) hours' pay, eight (8) hours' work shall be performed."

"(e) Positions not requiring continuous manual labor such as track, tunnel, bridge, and highway crossing watchmen, flagmen at railway non-interlocked crossings, lamp men, pumpers, engine watchmen, steam shovel, pile driver, crane and ditcher watchmen, will be paid a monthly rate to cover all service rendered * * *."

"(f) Except by mutual agreement, regularly established daily working hours will not be reduced below eight (8) to avoid making force reductions."

Both the evidence and the implications of Rule 4 (e) indicate that the work of the employees in question was one "requiring continuous application", particularly during the months in question of April to June, when it could not be said that weather conditions would prevent the possibility of continuous application. The clear meaning of Rule 4 (f) is that men assigned to such work should be on an eight hour day basis unless that basis were changed by mutual agreement. That basis was temporarily changed by an agreement made by the parties on January 6, 1932, following a series of lay-offs and of irregular work assignments protested by the employees. The agreement provided in substance that the carrier might work certain maintenance of way employees at not less than the equivalent of three eight hour days per week. Pursuant to this agreement, the carrier thereafter worked the men four hours a day, six days a week, which was the equivalent of three eight hour days. The agreement

provided that it could at any time be terminated by a ten-day written notice. Believing that conditions had improved to the point where the regular eight hour day provided for in Rule 4 (f) could be resumed, the representatives of the employees gave written notice of termination on April 13, 1933. The agreement therefore ceased to exist on April 23, 1933, and the terms of the original agreement between the parties automatically came back into effect. The carrier, however, from April 23 to June 12, inclusive, continued working the men four hours a day instead of eight as required by Rule 4 (f).

Under Rule 4 (f) the carrier, if it had wished to continue the four hour day, should have sought an agreement from the employees' representatives permitting such a course. In the absence of such an agreement, Rule 4 (f) was violated and the four hour assignment was improper.

There would be no doubt about the validity of the claim in this case were it not for the second sentence of Rule 4 (a) providing that for eight hours' pay, eight hours' work shall be performed. There is an apparent inconsistency here between this sentence and the provisions of Rule 4 (f), but since both clauses are a part of the agreement and must be given effect, and since there is no doubt as to the meaning of Rule 4 (f), the second sentence of Rule 4 (a) must necessarily be so construed as to enable it to stand and have some meaning without destroying the effect of Rule 4 (f). The only construction which seems possible is this, that if employees are assigned to eight hours work, they cannot collect their pay without carrying out their assignment, performing their obligations and rendering the work expected of them. In other words, the sentence in question calls for good faith on the part of the employees. It is in the nature of a general principle and it was derived from the set of general principles announced by the United States Railroad Labor Board in Decision 119.

In this case it was the carrier and not the neglect of the employees which prevented their doing eight hours' work. It seems clear that if the carrier had not given orders that only four hours should be worked, there would have been sufficient work to keep the men busy for eight hours, because the eight-hour day was restored only a few months later and has presumably since been maintained. Moreover, since November 1931, the work had been done with a greatly reduced force working reduced hours, and it seems proper to infer, especially in view of the resumption of the eight-hour day in June 1933, that there was plenty to do as a result of past arrearages.

To sum up, we do not think that the second sentence of Rule 4 (a) was ever intended to penalize employees whose hours were reduced below eight not through their own fault but by action of the management in violation of Rule 4 (f). If we were to hold otherwise, the management could disregard Rule 4 (f) at will and with absolute impunity. Such a result could not have been intended by the agreement.

It follows that the four-hour day assignments from April 23 to June 12, 1933, were improperly made, and having been improperly made the men should be compensated for the time lost. It is possible that if during the period in question the carrier had asked the employees for a further modification of the eight hour rule, some modification might have been agreed to, but this was not done and we cannot speculate upon what might have happened. Nor can we speculate upon the possibility that if an eight hour day had been maintained during the period as called for by the agreement, some of the claimants with the least seniority might have been laid off altogether so that it might be argued that they cannot now justly seek compensation for time lost. But not all those who were affected by the reduced work-day are among the claimants and, for all that we know, it may be that if any men would have been laid off to enable the rest to work eight hours, some or all of them might have been among those not now making claims. There is furthermore at least some indication in the record that the carrier could not very well have reduced the force numerically below its total during the period in question and that if it had maintained the eight-hour day as the agreement required, all would have worked as was the case from June 12 on. Since the carrier was at fault and not the men, and since each man suffered equally, the only fair result is to compensate each man on the assumption that he would have worked had the agreement been complied with.

On August 1, 1934, at the employees' request, Rule 4 (a) was revised and the difficult second sentence was removed. This revision occurred after the period involved in this case and cannot be construed as an admission that the sentence

in question barred the claim in this case. The removal of the sentence was natural in view of the misunderstanding to which its presence might give rise as indicated in this case. But that is not to say that because it was removed it should be construed at the time it was in the agreement as destroying altogether the effect of Rule 4 (f). Both rules were in the agreement, both must be given effect, and neither can be so construed as to destroy the other. The only construction which would save both rules would seem to us to be the construction adopted in this case, on the basis of which the claim must be sustained.

AWARD

The following employees shall be paid the difference between what they earned on the four hour per day assignment and what they would have earned had they been properly assigned to eight hours per day, between the period April 23rd to June 12th, 1933:

Mr. Lawrence Carpenter, foreman, Sec. 4, Whitewater.
Mr. H. J. Berg, foreman, Section 5, Milton Junction.
Mr. Frank McCulloch, Labor, Section 5, Milton Jct.
Mr. Adrian J. DeBlay, Labor, Section 6, Janesville.
Mr. Charlie C. Bushame, Labor, Section 6, Janesville.
Mr. William Monahan, Foreman, Section 7, Janesville.
Mr. Dan Monahan, Labor, Section 7, Janesville.
Mr. L. J. Berg, Foreman, Section 9, Brodhead.
Mr. Walter Teneyke, Labor, Section 9, Brodhead.
Mr. Carl Edwards, Foreman, Section 6, Janesville.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 26th day of March 1936.