Award No. 807
Docket No. MW-793

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: "That all Assistant Foremen and Trackmen compelled to lose time because of instructions issued by the Carrier that the above mentioned employes lose one week of four (4) days between December 10th and December 31st, 1937, be reimbursed for all time lost during the period specified in these instructions."

JOINT STATEMENT OF FACTS: "On November 6th, 1936, an agreement was entered into between the Boston and Maine Railroad and the Brotherhood of Maintenance of Way Employes at Boston, Mass., which reads as follows:

'MEMORANDUM OF AGREEMENT BETWEEN B. & M. AND EMPLOYES REPRESENTED BY BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

It is mutually agreed:

1—Regularly assigned Foremen shall be employed on a basis of not less than 5 days in each payroll week. Laborers and others shall be worked on a basis of not less than 4 days in each payroll week.

2—Reduction in force to absorb the additional cost will not be made by re-arrangement of sections.

3—Men required to work on lay-off days shall be notified before they quit work on the previous day, and shall be paid on the same basis as for regular assigned time.

4—This agreement does not apply to emergency crews or emergency labor.

The conditions of this Agreement shall not be modified without 30 days notice of either party.

For the Boston and Maine Railroad
/s/ A. H. Morrill
Chief Engineer

For the Brotherhood of Maintenance of Way Employes
/s/ R. D. Welch
General Chairman.'

Boston, Mass.
November 6, 1936

men in crews already reduced to a minimum,—Sectionmen and Assistant Foremen working four (4) days a week, Foremen five (5) days a week—the only way to accomplish expense reduction was by laying off entire gangs for short periods. See Award No. 492, So. Pacific.

"The purpose of the agreement of November 6, 1936, was to prevent the Management from reducing regularly assigned Foremen below five (5) days a week and regularly assigned Laborers, and others covered by the agreement, below four (4) days a week while working.

"There was nothing said in the conference prior to the signing of this agreement, nor was it the intent of this agreement, to guarantee four or five days a week, as the case might be, for men whose services were not required by the Railroad. There was no stabilized force contemplated or agreed to.

"This is evidenced by the fact that there is no rule in the current agreement which guarantees regular men any number of days work each week and in order to establish some limit below which men would not be regularly worked, agreement of November 6, 1936, was entered into.

"The agreement of November 6, 1936, did not nullify the provisions of Rule 49, which latter rule permits reduction of expenses by laying off gangs for short periods; that is—just what was done in December 1937.

"With Rule 5 restricting seniority rights of Trackmen and Laborers to their own gang, except when force is reduced; as force was not reduced except as shown on the Terminal Division, in this case, as men went back as formerly after one week's lay-off; as Rule 49 permits lay-off of gangs for short periods when proper reduction of expenses cannot be otherwise accomplished, there was no violation of rules or reason for paying men for service not performed."

OPINION OF BOARD: In support of the claim here presented the petitioner relies upon a "memorandum agreement" of November 6, 1936 between the carrier and it in which "it is mutually agreed (1) Regularly assigned Foremen shall be employed on a basis of not less than 5 days in each payroll week. Laborers and others shall be worked on a basis of not less than 4 days in each payroll week." This memorandum agreement further provides that "the conditions of this Agreement shall not be modified without 30 days notice of either party."

The carrier, in defense of its position, makes no contention that this special agreement was modified by subsequent negotiations between the parties. It rests its defense primarily on the contention that the agreement in question, properly construed, merely requires it assign the minimum number of days of work specified to the employes involved in any payroll week in which it elects to work the employes at all; and that the special agreement imposes upon it no obligation whatsoever to call the employes involved in any payroll week. Both the history of the memorandum agreement and the phraseology employed in it clearly demonstrate that this is a forced and wholly unreasonable construction. Even though it should be admitted that the language employed is ambiguous, a more reasonable construction is that this special agreement was entered into to guarantee to regularly assigned employes a certain amount of work during each payroll week so long as they continued to be regularly assigned employes. Nothing is more fundamental in the law of contract than the principle that when an agreement is susceptible of two constructions, one reasonable and the other unreasonable, courts will always adopt the reasonable construction.

The carrier further contends that the memorandum agreement of November 6, 1936 does not modify the Agreement of July 1, 1921, under which it claims it is entitled to do what is complained of here. In view of what has been said with respect to the carrier's previous contention, it is obvious that this contention is equally without basis.

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 employes involved in this dispute are respectively carrier and employes 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 in the practice complained of in this dispute violated the memorandum agreement of November 6, 1936.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 7th day of March, 1939.