

Award No. 1131

Docket No. MW-1117

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYES**

ATLANTIC COAST LINE RAILROAD

STATEMENT OF CLAIM: "Claim of monthly rated Floating Gang Foremen J. N. Butler, J. A. Butler, D. E. Hilton, L. W. Carter, C. J. Ellison, S. M. Burney, M. W. Peel, and A. E. Culbreth, that the Carrier violated Agreement Rule 5, Section 4, by laying them off five days between December 24th and December 30th, 1938, and that each of them shall be paid for the five days lost as a result of this improper layoff."

EMPLOYES' STATEMENT OF FACTS: "Under date of December 7th, 1938, the following instructions were issued by Roadmaster V. A. Hodges:

"The following from Mr. Landin, Engineer Maintenance of Way, and be governed accordingly:

"Effective at the close of work on December 23d, all floating gangs, work trains, ditchers or other machinery will be laid off, up to and including December 30th. If the employes on these gangs prefer to take the holiday designated for January 2, 1939, on December 31st, 1938, such may be done in which event the employes report for work at the usual work hour on January 2, 1939. This means the holiday is taken one day before January 1st, instead of one day after.

"Request for passes to be used during this layoff should be sent in promptly, and in proper shape to avoid the Pass Bureau rush."

"Under date of December 20, 1938, General Roadmaster H. C. Koelz addressed the following instructions to the foremen:

"Please advise where your camps will be stored during the layoff, and where you and men can be reached in case of trouble."

"In conformity with instructions thus issued, floating gang foremen involved in the claim were laid off and lost time five days during the period December 24th to December 30th, 1938."

POSITION OF EMPLOYES: "Floating gang foremen are paid a monthly rate based on 204 hours per month. The governing Schedule rules, Rule 5, Section 4, and Rule 5, Section 10, read as follows:

"Section 4. Monthly compensation covers all service rendered by monthly rated employes except when required to perform service in excess of regular working hours. Deductions shall not be made from the time of monthly rated employes for Sundays or the seven desig-

"The petitioners in further support of their claim drew attention to Awards Nos. 320, 759 and 805 of the Third Division. The Carrier submits that in these awards of the Division, a differently worded rule from the rule in its agreement is dealt with, also additional rules which do not appear in its agreement, and that the decision rendered by the Division in this dispute should rest upon the rules in the agreement between the respondent carrier and its employees, and the long established practice thereunder as above explained."

OPINION OF BOARD: Employees of the classification of claimants here, "floating gang foremen," are employed by the month. By order of the carrier they were laid off from December 24 to December 30, 1938, and suffered a proportionate pay reduction. The brotherhood contends that the carrier violated rule 5, section 4, of the agreement, while the carrier maintains that the claim exhibited is not predicable on that rule. It reads: "Monthly compensation covers all service rendered by monthly rated employees except when required to perform service in excess of regular hours. Deductions shall not be made from the time of monthly rated employees for Sundays or the seven designated holidays: * *. Work that may be required on either of these days will be paid for additionally. * * *." Factually, as well as in rules, the record here is not essentially different from the facts and rules examined and analyzed in Awards 320, 759, 805 and 1010. We are disposed to regard the doctrine developed in those pronouncements as sound and controlling.

The carrier, seeking to bar consideration of the claim on its merits, asserts that for years the custom has been "to lay off the floating gangs for one week or two weeks at the Christmas season, and to not pay the foremen for the days their gangs were laid off. That this custom, or practice, has been understood and acquiesced in by the employees," continues the carrier, "is evidenced by the fact that they have heretofore in previous years when such lay-off occurred, made no such claim as the instant claim." Assuming the premise, although the brotherhood controverts it, we cannot think it operates to absolve the carrier. Acquiescence in the carrier's action did not attend in this instance. Note pertinent language in Awards 137 and 456.

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 carrier violated the agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of June, 1940.