Award No. 5134
Docket No. MW-5033

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

ATLANTA AND WEST POINT RAILROAD COMPANY

THE WESTERN RAILWAY OF ALABAMA

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

(1) That the Carrier violated the provisions of the effective agreement when it abolished monthly rated positions on July 11, 1949, and failed to compensate the employes affected at the agreed to monthly rate;

(2) That all monthly rated employes assigned to monthly rated positions, who were adversely affected by the Carrier's improper action, be paid the difference between what they received and what they should have received at their agreed to monthly rate of pay.

EMPLOYES' STATEMENT OF FACTS: Effective July 11, 1949, certain monthly rated positions were cut off.

The monthly rated positions which were discontinued, effective July 11, 1949, were positions which comprehended 204 hours of service per month. The hours comprehended in the monthly assignment being arrived at by dividing 2448 hours by the number of months in the year. The Employes who were adversely affected because of the monthly rated positions being cut off, were not compensated at the agreed to monthly rate of pay for July, 1949.

The agreement in effect between the two parties to this dispute, dated December 16, 1944, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Monthly rated employes, whose positions were cut off July 11, 1949, were employed by the Carrier, and paid a monthly rate to cover their regular assignment on the established working days of the month. The basic work day established under the provisions of Rule 13, of the effective agreement provides that eight (8) consecutive hours, exclusive of the meal period, shall constitute a day.

Rule 15-A of the effective agreement provides a method of determining hourly rates for monthly rated positions. For your ready reference, we are quoting below Rule 15-A of the effective agreement.

"(a) To compute the hourly pro rata rate of monthly rated positions such as foreman, assistant foremen, machine operators, road

employes' submission in Award No. 4170, they laid stress on the fact that they only had a weekly guarantee, and argued further that the reductions were not bona fide, in that the employes affected were not given opportunity of exercising seniority, the implication being that had this been done, no claim would have been filed. Now we have them claiming they have a monthly guarantee and only force reductions can be made at the end of the month, unless we pay employes adversely affected their, as they term it, "agreed to rate of pay."

In the sustaining opinion in Award No. 4170, the majority, speaking through Referee Swain stated, * * * We have often held that positions once established by a Carrier may not in the absence of agreements therefor, be abolished unless the work of the positions ceases to exist * * *.

What we did in the instant case was to track Judge Swain—we had a proper agreement and we complied with all technicalities.

This case is no different from that of a clerical employe. The clerical employes have a weekly guarantee rule; they have a force reduction rule, and we know of no case where they have claimed that an employe affected in a force reduction was covered by a monthly guarantee.

Attention is called to the fact that this claim is vague and indefinite. It does not name any particular employe or specify the period for which time is claimed, although we assume it is for the balance of July. This Division might be interested in knowing what happened to the men affected by the reduction. Extra Gang Foreman Wilson did not exercise his seniority, preferring to work extra. He was off July 11th through July 16th, and relieved Section Foreman at Whitehall, Ala., July 18th through July 31st. The extra gang was reinstated effective August 1st and he bid the job back in. He lost nothing.

Section Foreman R. L. Coleman, Louise, Ga., took one week's vacation, July 11th through 16th, then rolled the Foreman at Cusseta, July 18th.

Foreman Galloway, rolled by Coleman, rolled the Whitehall Section Foreman J. D. Abbott, then took two weeks vacation, July 18th through July 30th, being relieved by Foreman Wilson. Abbott took an Apprentice job at Whitehall Section. Galloway lost nothing.

W. F. Ganues rolled to Selma July 11th, relieving Foreman Johnson, who took Apprentice job at Selma.

There is no rule in this agreement on which to base this claim. What they are trying to do through the medium of this claim is to get you to write a new rule. This you are not authorized to do.

The claim is utterly without merit and we respectfully ask that it be declined.

OPINION OF BOARD: This dispute involves the right of the Carrier to abolish monthly rated positions at any time during the calendar month, without paying the monthly rate for the entire month to employes whose positions were abolished.

The Organization contends that the month is the unit of employment for monthly rated employes and that they must be paid the monthly rate for the entire month whether their services are utilized or not.

The Carrier contends that its right to abolish positions no longer needed is provided for in Rule 9 of the Agreement and that there is no exception to entire month when positions are abolished.
the rule which prohibits the Carrier from abolishing a monthly rated position at any time during the month, or requiring it to pay the monthly rate for the

There is no evidence in the record of the terms of hiring except that which is covered by the rules of the Agreement between the Carrier and the Organization. On the basis of Board precedent, (Awards 759, 1010, 1131, 2975, 3756, 3757), it has been vigorously argued within the Board, (1) that when the subject Agreement was negotiated, the Organization intended that the instant rule should be construed the same as the rules in the cited Awards; (2) that the Carrier is chargeable with notice of the existing Awards at the time, and therefore must be held to have intended that the month was the unit of employment for the employes in question; and (3) that the confronting rules constituted, in effect, a guarantee of a month's pay whether the employe was or was not used.

A mutual intent, clearly expressed or reasonably implied, would be binding upon the parties, if it can be said that they contracted with the idea in mind to be thus bound. Whether such was the true intent can only be ascertained by looking to the conduct of the parties in applying their Agreement, comparing rules in question, and by reviewing Board precedent.

The Organization's past conduct on the property impresses us as weighing most heavily against its claimed intent. There is proof that over a period in excess of ten years, six of which have transpired since signing the current Agreement, the Carrier has abolished monthly rated positions without compensating monthly rated employes for the balance of the month and there has been no protest. While this is not binding on the Organization if it has a valid claim under the Agreement, it is some evidence of a contrary intent than that which is now urged.

As to the rules of Agreement, a comparison has been made between rules in the above cited Awards and the rules of the instant Agreement. At this point it should be stated that the Awards on which the Organization relies were before the Board when it decided the case covered by denial Award 5074. In that case, while the Board declined to follow the foregoing precedents, it did not overrule the same, but permitted them to stand as authority for whatever reason they may be found persuasive in dealing with the same or similar factual situations as were present in the reported cases. Accordingly, they must be reexamined in relationship to the facts of this case.

In Award 759 the Organization in its statement of position argues that positions were not abolished, and that the compensation was for all work including overtime. The Board expressly discounted any claim of "monthly guarantees." On the grounds that there was no governing provision in the schedule, the Board sustained the claim on a general proposition of law.

Award 1010 merely adopts the Board pronouncements in Award 759, without commenting on the rules of the Agreement. In Award 1131 the rule provided that the monthly compensation covered all services except when performed outside regular hours, and precluded deductions for Sundays and seven designated holidays. Again the doctrine of Award 759 was reaffirmed. Awards 2975, 3756 and 3757 were not in existence at the time the subject Agreement was made, so it cannot be said that the principles therein enunciated were within the contemplation of the parties as independent authority for construing the rule before us now. In addition, we again find the rules are much different. As in the earlier Awards, they provided that the monthly rate covered "all services rendered." In Award 3756, the rule expressly provided that the employes working the named positions on a monthly basis, "will be paid a flat monthly salary to cover all services rendered, without additional payment for overtime, and without deduction in the flat monthly salary account curtailment in hours worked." Award 3757 involved a weekly guarantee and is not applicable to the instant claim.

We believe the foregoing conclusively establishes that, because of rules' differences, there is nothing in the cited Awards which can be said to bind the Carrier to any pre-existing doctrine of this Board, or by which it can now be claimed that the Carrier, by adopting Rules 15 and 34 of the current

Agreement, agreed to pay the monthly rate for the entire month, on abolishment of jobs before the end of the calendar month.

On careful reading of Rules 15 and 34, as well as other parts of the Agreement, we fail to see anything therein which can be said to be evidence of a hiring from month to month. Rule 15 sets forth the method of computing the hourly rate of monthly paid positions for the purpose of determining pro rata and overtime rates. Rule 34, as supplemented by Appendix A, fixes both the monthly and hourly rates for named positions, and furnishes the basis for fixing rates of pay for new and omitted positions. Under the later authority of Awards 4849 and 5052, neither can be said to be a "monthly guarantee" rule.

To the extent these later Awards represent a departure from Award 759, and that line of authority, such must be accepted as a shift in the weight of judicial opinion. Whatever may be said in criticism of this change of Board position, if in fact it be a change, is tempered by the realization that only the laws of nature are immutable. We must not lose sight of the fact that in a free enterprise system, what is legal today is malversation tomorrow though not a comma is changed in the law; only the weight of judicial and public opinion concerning it has shifted. Substance, not the shadow, should determine the principle of law, and as rules, by progression, take on greater substance, interpretations must change if the Board is to keep pace with changes in thinking on the different properties where the rules govern.

We do not believe it can be contended successfully that incumbents of monthly rated positions are in the same rules' position today that they occupied when this Board was committed to the doctrine of Award 759. Thus, as the rules change, the Board's interpretations can be expected to undergo like changes to keep pace with the changes in thinking which the rules' changes reflect.

Under later Board precedent, which reflects current views, there is no basis for sustaining the claim and it must be denied.

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 did not violate the Agreement.

AWARD

Claim (1 and 2) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 13th day of December, 1950.