

Award No. 5548

Docket No. MW-5377

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Alex Elson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

NORTHERN PACIFIC RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood: (1) That subsequent to September 1, 1949, the Carrier violated the effective agreement when they assigned the duties of Section Foreman, Crew No. 5, Fourth Street, St. Paul, Minnesota, to employees other than the regular assigned Foreman, P. O. Lysaker;

(2) That subsequent to September 1, 1949, the Carrier violated the effective agreement when they required the section laborers assigned to Crew No. 5 to lay off on the recognized working days of the crew (Monday through Friday) without compensation and, in addition, required them to render service on the recognized rest days of the crew (Saturday and Sunday) and paid them for such service at their straight time rate of pay;

(3) That P. O. Lysaker be paid at his respective time and one-half rate of pay for each day that another employee was assigned to supervise Crew No. 5;

(4) That the section laborers in Crew No. 5 be paid at their respective straight time rate of pay for each day of their regular assignment that they were held out of service, and, in addition be paid the difference between what they did receive at their straight time rate of pay and what they should have received at their time and one-half rate for service rendered on Saturdays and Sundays.

EMPLOYEES' STATEMENT OF FACTS: Prior to September 1, 1949, the employees of section crew assigned to Section No. 5, Fourth Street, Saint Paul, Minnesota were assigned six (6) days a week—Monday through Saturday.

Effective September 1, 1949, the 40 Hour Work Week was inaugurated in the Railroad industry. This agreed to change in working hours provided that the Employees in the Maintenance of Way Department would be assigned eight (8) hours a day, five (5) days a week.

The employees in section crew on Section No. 5 were required to work as follows:

and Sundays for work not performed finds no support under schedule rules but militates against the principles enunciated by this Division in Awards Nos. 3195, 3222, 3223, 3232, 3375, 3376, 3488, 3587, 3745, 3955 and 4244.

The Carrier has shown

1. Service, duties or operations performed by the section crew assigned to Section No. 5 at St. Paul, includes the work of icing cars during the icing season, which work extends over a period of seven days each week.

2. Effective September 1, 1949, a work week consisting of five days of eight hours each was established for employes assigned to the section crew maintained on Section No. 5 at St. Paul, in conformity with Rule 26-1(a).

3. The work week established for Section Foreman P. O. Lysaker extended from Monday through Friday with Saturday and Sunday as rest days, in conformity with Rule 26-1(a).

4. The relief assignment established to relieve Section Foreman P. O. Lysaker on Saturdays and Sundays and to perform work as a sectionman on Wednesdays, Thursdays and Fridays, was established in conformity with Rule 26-1(e and Rule 26-2(c).

5. The work weeks established for the Sectionmen assigned to the section crew maintained on Section No. 5 and the staggering of such work weeks to meet operational requirements of the Railway Company, was in conformity with Rule 26-1(a) and Rule 26-1(d).

6. The assignment of work of icing cars on Sundays during the icing season could not be dispensed with on such days, and therefore such work was assigned on Sundays pursuant to the note appearing under Rule 27(f).

7. (a) Section Foreman P. O. Lysaker was relieved on his rest days in conformity with Rule 26-1(e) and Rule 26-2(c) and therefore there is no rule that would sustain a claim for payment of additional compensation on Saturdays and Sundays when relieved on such days by the occupant of the relief assignment.

(b) The Sectionmen assigned to the section crew maintained on Section No. 5 were assigned a work week in conformity with Rule 26-1(a) and Rule 26-1(d), and therefore there is no rule that would sustain a claim for payment at time and one-half rate for work performed on Saturdays and Sundays, and for payment at straight time rate on days during a work week extending from Monday through Friday that these employes were not assigned to work.

The claim should be declined.

(Exhibits not reproduced.)

OPINION OF BOARD: This case involves the application of the 40-Hour Week Agreement and also a seniority issue. The facts are not in dispute.

A section crew consisting of a foreman and six section men were assigned to Section 5, Fourth Street, St. Paul, Minnesota. Their work included track maintenance work and the icing of cars during the icing season. Prior to September 1, 1949, the employes were assigned 6 days a week, Monday through Saturday, with Sunday as a rest day. During the car icing season, some of the members of the crew were called to work on Sundays and were paid on an overtime basis.

Effective September 1, 1949, a 40-hour week was inaugurated. The employes were assigned 5 days a week, 8 hours a day. Each of the employes had a different assignment. The foreman of the section crew was assigned to work Monday through Friday with rest days of Saturday and Sunday. One member of the crew was assigned to work Tuesday through Saturday, another Wednesday through Sunday, another Thursday through Monday, another Friday

through Tuesday, another Saturday through Wednesday, and another Sunday through Thursday. The work performed by employees on Sunday was limited to icing cars.

One of the section laborers assigned a work week of Wednesday through Sunday relieved the section foreman on Saturdays and Sundays. He was paid for his Saturday and Sunday service at the rate of the section foreman's pay. The position of relief foreman was not bulletined. The regular foreman was not relieved of any of the clerical duties arising out of the Saturday and Sunday service of the members of the crew. The Carrier did not recognize that the section laborer who relieved the foreman on Saturday and Sunday was in complete charge of the crew. The foreman continued to make out all time reports, distribution sheets, work reports and other reports required with Saturday and Sunday assignments.

Effective October 17, 1949, after protest by the Organization, all the members of the crew were assigned to work 8 hours a day from Monday through Friday.

Several issues are presented. The first contention by the Organization is that the Carrier violated the Agreement by attempting to stagger the work weeks of the employees without first complying with the provisions of Rule 26-1(e). This Rule reads as follows:

"(e) Regular Relief Assignments: All possible regular relief assignments with five days of work and two consecutive rest days will be established to do the work necessary on rest days of assignments in six or seven-day service or combinations thereof, or to perform relief work on certain days and such types of other work on other days as may be assigned. Where no guarantee rule now exists such relief assignments will not be required to have five days of work per week.

Assignments for regular relief positions may on different days include different starting times, duties and work locations for employees of the same sub-department in the same seniority district, provided they take the starting time, duties and work locations of the employee or employees whom they are relieving."

In accordance with the principles set forth by this Board in Award 5545, we must hold that the Carrier did not violate the Agreement in this respect.

The second contention relates to the issue as to whether the Carrier in any event was correct in considering the assignments and work to be performed as a 7-day position, as that term is defined in Rule 26. The fact is that prior to September 1, 1949, the Carrier considered the operation as a 6-day operation. The employees had a work week from Monday through Saturday with Sunday as a rest day. During the icing season some of the crew were called on Sundays and were paid on an overtime basis. Nor did the Carrier make a showing of change in operations subsequent to September 1, 1949, which would make the position a 7-day position. The work week cannot qualify as a 7-day position as that term is defined in the rules. Rule 26-1(d) reads as follows:

"(d). Seven-day positions: On positions which are filled seven days per week any two consecutive days may be the rest days with the presumption in favor of Saturday and Sunday."

The Organization further contends that the Carrier violated the seniority rights of the foreman by working a section laborer as foreman on Saturdays and Sundays. There can be no question but that by virtue of the staggered assignments made and the method by which relief was furnished the regular foreman was denied the right to supervise the members of his crew who were required to render Saturday and Sunday service, and the claim as to the foreman is therefore well founded. See Awards 3627, 4803, 5261.

The Organization makes claim for pro rata rate of pay for each day that the section laborers were held out of service. It also makes claim for the overtime rate for the rest days that the employees worked. Since we have held that this operation is not a 7-day operation but is a 6-day operation, the only assignments which would be proper would be assignments from Monday to Friday with rest days of Saturday and Sunday, and assignments from Tuesday to Saturday with rest days of Sunday and Monday. The foreman and one of the employees had such assignments. All of the other section laborers had assignments which called for work weeks involving rest days other than Saturday and Sunday, and Sunday and Monday. Accordingly, as to each of them it is true that they were not permitted to work one or more days of the week which should have been part of the regular assignment.

The amount of the penalty which can be imposed in each case varies because of the number of days held out of service, and because of the work done on rest days. It is well established by this Board that penalties cannot be pyramided. We believe that in the absence of exceptional circumstances requiring a contrary conclusion, where two or more violations carrying different penalties are established, the higher of the several penalties involved is the one imposed. See Award 5423.

In each case the higher penalty would be an award allocating the pro rata rate of pay for each day of each work week that the employee was held out of service during the period in question. In the case of the employee who worked from Wednesday through Sunday, the penalty will be one day's pro rata pay for each work week of the period in question. For all other employees, the penalty should be two days' pro rata pay for each work week of the period in question since they were held out of service for two days of the work week that should have been assigned to them.

The claim made for the foreman is that he be paid at the time and one-half rate for Saturdays and Sundays that his position was worked by a section laborer. Inasmuch as the foreman did not work on those days, under the principles established by this Board the applicable rate is the pro rata rate and not the punitive rate.

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 Carrier violated the Agreement to the extent indicated in the Opinion.

AWARD

Claim sustained in part and denied in part in accordance with the above Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 8th day of November, 1951.