

Award No. 6667

Docket No. MW-6678

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**LOS ANGELES UNION PASSENGER TERMINAL
(SOUTHERN PACIFIC COMPANY—PACIFIC LINES,
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY
COMPANY AND THE UNION PACIFIC RAILROAD COMPANY)**

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

- (1) That the Carrier violated the effective agreement on Saturday, September 3, 1949, and on subsequent Saturdays thereto when it required or permitted an employee excepted from the Scope of the Agreement to supervise members of the section force regularly assigned to the supervision and jurisdiction of Section Foreman Vito Carone;
- (2) That Section Foreman Vito Carone be allowed eight hours' pay at his time and one-half rate for Saturday, September 3, 1949, and for each Saturday subsequent thereto, in which the Carrier violated the Agreement as referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Mr. Vito Carone is assigned as Track Foreman at the Los Angeles Union Passenger Terminal, and is regularly assigned to supervise the work of and to keep the time rolls of Sweepers, Trackwalkers and Trackmen employed in the Los Angeles Union Passenger Terminal.

Mr. Carone and the major portion of his gang are assigned to work Mondays through Fridays. Seven sweepers and one track walker assigned to Mr. Carone's jurisdiction are required to work on Saturdays, all beginning work on Saturdays at 6:00 A. M. except one sweeper who begins work at 10:00 A. M.

All Saturday work performed on September 3, 1949 and on Saturdays subsequent thereto, is supervised and observed by the Carrier's Terminal Engineer, an official who is excepted from the Scope of the Agreement.

During the period involved in the instant dispute, the Terminal Engineer has supervised the Saturday work performed by the track forces including

necessary and, as a result thereof, only clerical work formerly performed by the foreman remained it could be assigned to clerks. See Award 4992 of this Division."

The Terminal asserts that its decision not to employ a track foreman on the Saturdays involved in this dispute was entirely proper and did not contravene any provision of agreement involved. While the petitioner has cited the Scope Rule and Rules 2, 19, 23, 27 and 31 of the current agreement in support of claim, a careful reading of said rules will reveal that they lend no support to the claim. In this connection, the Terminal submits that no basis is present under any rule of the current agreement for the instant claim.

Attention is also directed to the fact that while this claim is submitted retroactive to September 3, 1949, the claim was first submitted on May 4, 1951, notwithstanding the fact that petitioner's representatives were fully aware of the particular situation here involved from its inception, the petitioner having in effect recognized there was no basis for claim or complaint until Award 5225 of this Division was made, including reference, "Commencing with Saturday, September 3, 1949, the Terminal Engineer supervised the sweepers on Saturday," which reference was incorrect, as clearly indicated by the facts in this docket, and which reference likewise dealt with a matter not before the Board in docket covered by its Award No. 5225.

Without prejudice to carrier's position that the claim in its entirety is without basis or merit, even if a valid claim did exist (which the carrier denies) there would be no basis for claim for eight hours at time and one-half in view of the fact that time for "work" performed on rest days is payable (with minimum of 2 hours 40 minutes) only under Rule 31, and Rule 23 is not applicable to work performed on rest days; attention is also directed to the fact that no "work" is involved in this docket as related to numerous awards of this Division dealing with payment of pro rata rates in situations in which no work was performed.

CONCLUSION

The Terminal asserts that it has conclusively established that the claim in this docket is without basis or merit, and therefore, respectfully submits that it should be denied.

All data herein submitted have been presented to the duly authorized representative of the employees and are made a part of the particular question in dispute.

The Terminal reserves the right if and when it is furnished with the submission which may have been or will be filed ex parte by the petitioner in this case to make such further answer as may be necessary in relation to all allegations and claims as may be advanced by the petitioner in such submission, which cannot be forecast by the Terminal at this time and have not been answered in this the Terminal's initial submission.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim is a corollary to that involved in Docket MW-5129, Award 5225.

The Carrier's argument to the effect that this claim should be denied because it is a splitting of a cause of action is without merit. The claim made in Docket MW-5129, Award 5225, was based upon occurrences arising prior to the institution of the 40-hour week when the Claimant was working on Saturdays; it was handled to conclusion with the Carrier on March 1, 1949, and subsequently appealed to this Board. Incidents alleged by the Employees as affording a basis for the instant claim arose after final handling of the claim in Docket MW-5129, Award 5225, on the property. In the absence of

agreement with the Carrier that this claim be progressed to the Board along with the earlier one, conceivably the Employees could be leaving themselves in a position where the instant claim might have been dismissed on the ground that it was not properly handled on the property.

The issue in this docket is simply one of fact, that is, whether or not the Terminal Engineer actually supervised the work of the seven sweepers and one trackwalker on Saturdays which employes were under Claimant's supervision Monday through Friday. The Employees point to the following statement in the Opinion of the Board in Award 5225 as indicative of the fact that the Terminal Engineer did so supervise the Sweeper Force on Saturdays: "Commencing with Saturday, September 3, 1949, the Terminal Engineer supervised the sweepers on Saturdays. However, the effect of this change cannot be considered here as the form of the claim does not cover it."

The above quoted language was, of course, not essential to the determination of the dispute presented in Docket MW-5129, Award 5225. In so far as this claim is concerned it does not constitute a binding finding.

The record in both dockets, MW-5129, Award 5225, and in the instant docket indicates that the manner of checking the force in and out on Saturdays is practically identical with that used on Sundays. In the earlier docket there does not appear to be any facts shown to indicate that the Terminal Engineer performed any other type of service on Saturdays in so far as the sweeper force is concerned than he did on Sundays. On the basis of the quoted statement from Award 5225 standing alone we find no basis for a finding that the Terminal Engineer or any other employe exercised supervision over the Saturday force. We must, therefore, look to the record in this docket to determine if there are facts shown here to indicate whether or not specific instances of something more than checking the time clock records for attendance was done by other employes on Saturdays to justify a finding that someone other than Claimant supervised the work of the Saturday force.

On certain dates the employes show specific instances of the performance of more than the mere checking of time clock records for attendance by the Terminal Engineer. His handling of the men on those dates as indicated by the record shows that he did actually supervise their work. Those dates in 1951 are March 24, May 5, 12, 19, 26, June 2, 9, 16, 23, 30, July 7, 14, and in 1952, January 5, March 15 and April 19. The Employees assert and Carrier denies that what was done on these Saturdays is typical. We have no way of resolving that conflict. As to the named Saturdays, the claim will be sustained for a "Call" for the supervision exercised by the Terminal Engineer does not appear to have extended beyond a 2 hour and 40 minute period. As to other Saturdays following March 24, 1951, that will be referred back to the parties to be disposed of in the light of the views expressed in this Opinion upon proof that supervisory work (if any) in connection with this Saturday force was performed by an employe other than Claimant.

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 Employe involved in this dispute are respectively Carrier and Employe 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 extent indicated in Opinion of Board.

AWARD

Claim disposed of as indicated in Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 15th day of June, 1954.