

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Daniel House, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY**

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

(1) The Carrier violated the Agreement beginning on October 1, 1961, when it failed to assign the senior track foremen and the senior track laborers at Gary Mill Yard to perform rest day and overtime work at that location. (Carrier's files VM-15-61, VM-16-61 and VM-17-61.)

(2) Each of the claimants and/or their successors be allowed the exact amount of monetary loss he sustained as the result of the violation referred to in Part (1) of this claim during the period beginning October 1, 1961 and continuing until said violation is corrected.

The claimants are:

Track Foremen

H. Sullivan

A. Hilbrich

Track Laborers

S. Sackle

C. Hankins

D. Regep

E. Dorman

I. Kwasniski

P. Triantopoulas

S. Husman

R. Andrews

F. Gaza

Track Laborers

P. Batalis

E. Thatschiow

A. Rack

V. Valdez

N. Haugen

Z. Antic

J. Prischepa

V. Eliopoulos

A. Cruz

(3) A joint check of the Carrier's records shall be made to accurately determine the employees to whom claims should be paid and the amount due each.

construction operations at Gary Mill. Thereafter, the bulk of this mechanized equipment was procured piece by piece over the next nine months. On the latter basis, it was assigned to and worked into the operations of the respective gangs. The operations throughout this period were in a state of continual adjustment and readjustment. Additional Crane Operator positions and Roadway Machine Operator positions were added to the respective gangs as more and more equipment came in. Gradually, the gangs became more and more mechanized and efficient. As this machinery was worked into the respective gangs it did not immediately replace laborers for they had to pick up the slack while an efficient mechanized operation was worked out in such close confines.

Some of this equipment was utilized 24 hours a day, 7 days a week; it of course had to be serviced and maintained on the same basis. In order to accomplish the latter, a minimal number of Motor Car Repairmen and Garage Servicemen were assigned to seven day positions, staggered jobs, on the first shift, only. Since 1951, Gary Division and Joliet Division Motor Car Repairmen and Garage Servicemen have been working on more than one shift on a Monday through Friday basis. (For corroboration of the latter statement, see pending MW File 2100, involving the instant parties.)

The increasing intensity, concentration and congestion of the traffic patterns at Gary Mill have placed a definite limit on the amount of mechanized construction and maintenance equipment that effectively can be utilized on one shift. As a matter of fact, by the end of 1962 the Carrier attained the saturation point or the maximum effective peak of construction and maintenance operations on the first shift at Gary Mill. Beyond this point only diminishing returns were experienced.

INVOLVED RULES

The applicable BMW Schedule was revised and re-issued effective August 1, 1952, and it is on file at the Board. The previous schedule was dated effective December 1, 1945.

The Carrier and the Organization are parties to the March 19, 1949 National 40 Hour Work Week Agreement and we are parties to Article V of the August 21, 1954 National Agreement.

When the Organization's August 1, 1952 Schedule was revised, the National 40-Hour Work Week Agreement was incorporated into its body. The provisions of the National 40-Hour Work Week Agreement presently are set forth in Rules 22, 25, 27 and 28 of the August 1, 1952 bound edition of the Organization's Schedule.

The Board may also desire to examine the provisions of Rules 29(a), 30, 33, 57 and 59(c).

(Exhibits not reproduced.)

OPINION OF BOARD: On October 1, 1961, without agreement by Organization, Carrier inaugurated a 3 shift, 7 day a week (21 trick) track maintenance and construction operation, and began on that day to implement it by making new work assignments to certain employes on the basis of their

bids for the posted new positions and their seniority. The new 21 trick operation was accompanied, among other things, by increased mechanization of the work and the introduction of new and additional mechanical equipment; as this progressed there was a consequent expansion of secondary functions of servicing and supplying the more mechanized operations. Thus changes in positions to seven day positions continued to take place in stages at various times subsequent to October 1, 1961. Organization filed 18 claims reflecting this series of events, starting with three on November 8, 1961, which related to the October 1, 1961 changes in positions, and up to June 26, 1962, when it filed three relating to changes in positions on April 30, 1962; these were grouped and progressed to this Board as five separate cases in Dockets MW-14861, 14862, 14928, 14929 and 14930, and were considered by us at the same time.

We have disposed of the claims in Docket MW-14861 in our Award No. 17030 on the procedural grounds that Organization failed timely to progress it on the property and could not, as it attempted to do, properly refile the identical claim changing only the effective date of the claimed remedy. The claim in this case rests on the same basic contract question and arises out of the same events as the claims in MW-14861. Carrier argues that, since Organization chose to divide its cause of action between these cases, and MW-14861 is the "pilot case," the second (here involved) case should meet the same fate as the first and be dismissed. MW-14861 was dismissed for failure to meet the Time Limit Rule and without consideration of the merits; the Time Limit Rule, however, was met in this case and there is thus no reason to refrain from dealing with it on its merits.

The claim in this case is based on Organization's contention that certain new positions established unilaterally by Carrier on October 1, 1961, in connection with inaugurating the 21 trick operation were improperly established because Carrier failed and refused to negotiate the new positions with Organization; therefore, argues Organization, in assigning work on those new positions at hours which were overtime hours of the previous 5 day per week operation to employees junior to Claimants, Carrier violated the seniority rights of Claimants.

Organization introduced as part of the record in this case its entire Submission in MW-14861, where it argued basically the impropriety of the steps taken in the unilateral establishment of the 21 trick operation; we have considered it in connection with this case. The position of Organization is that Rule 22(f) together with a Memorandum of Understanding dated July 9, 1949, with relation to its application, and Rule 59 (c) each require that Carrier may not change from a five day per week day shift operation to a 21 shift operation without prior negotiation and agreement with Organization.

Rule 22 (b) and (f) and the Memorandum of Understanding read:

"(b) Five-day Positions

On positions the duties of which can reasonably be met in five (5) days, the days off will be Saturday and Sunday."

(f) Deviation from Monday-Friday Week

In positions or work extending over a period of five (5) days per week, where the Carrier contends its operational requirements

cannot be met under the provisions of Paragraph (b) of this Rule, and some employes are required for services Tuesdays through Saturday, such assignments may be agreed upon between the parties signatory hereto."

"MEMORANDUM OF UNDERSTANDING

It is agreed this 9th day of July, 1949, by and between the Elgin, Joliet and Eastern Railway Company and its employes represented by Brotherhood of Maintenance of Way Employes that with respect to application of Rule 22 of paragraph (f) of agreement effective September 1, 1949, the Carrier will on September 1, 1949, place its five day per week positions for track forces on a Monday through Friday weekly basis but should experience on such a basis indicate the feasibility of assigning certain track forces on a Tuesday through Saturday weekly basis the Carrier will advise the General Chairman of its desire to do so and will attempt to arrive at an agreement on same. Should the parties fail to agree thereon and the Carrier then nevertheless assigns certain track forces on a Tuesday through Saturday basis the Brotherhood of Maintenance of Way Employes may process such action as a grievance under the basic agreement."

Rule 59(c) reads:

"REPRESENTATION

All questions pertaining to rates of pay, rules and working conditions, including seniority arising under this agreement shall be matters of negotiation between the officials of the Elgin, Joliet and Eastern Railway and the duly authorized representatives of the Brotherhood of Way Employes or their duly accredited representatives."

Clearly on the face of the Rule, 22 (f) deals only with changing the rest days of five day positions from Saturday and Sunday to Sunday and Monday, and not at all with the question we are here dealing with — the change from a five day, day shift operation to a 21 trick, seven day virtually continuous operation; thus neither Rule 22(f) nor the Memorandum are applicable to the facts in this case.

We do not consider that the establishment by Carrier of the new positions and hours necessary for operation needs be negotiated as a working condition within the meaning of Rule 59(c) (as argued by Organization in this case). The Agreement of the parties here clearly contemplated the possibility of a seven day per week, three shift operation and established working condition with relation thereto ;and we find no specific Rule requiring that Carrier negotiate before exercising its right to establish such an operation if it is required to meet the needs of the service.

Rule 22 Section 1 provides that:

"The expressions 'positions' and 'work' used in this agreement refer to service, duties or operations necessary to be performed the

specified number of days per week, and not to the work of individual employees.

(d) Seven-day Positions

On positions which have been filled seven (7) days per week any two (2) consecutive days may be the rest days with the presumption in favor of Saturday and Sunday.

(e) Regular Relief Assignments

All possible regular relief assignments with five (5) days of work and two (2) consecutive rest days will be established to do the work necessary on rest days of assignments in six (6) or seven (7) 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 under this agreement."

Rule 23(b) reads:

"(b) For regular operations requiring continuous hours, eight (8) consecutive hours without meal period may be assigned as constituting a day's work, in which case twenty (20) minutes shall be allowed in which to eat, without deduction in pay."

and Rule 27(d) and (e) include:

"(d) In order to provide relief for seven (7) day per week positions in the Track sub-department the Carrier may establish without penalty relief positions involving duty on various shifts which may include a number of tours of duty less than five (5) per week in groups or ranks other than laborer, such as crossing watchman and track walker, and the remainder of the tours of duty in the work week as laborer. * * *

(e) The elimination of punitive rates for Sunday work as such does not contemplate the reinstatement of work on Sunday which can be dispensed with. On the other hand, rigid adherence to the precise pattern that may be in effect immediately prior to September 1, 1949, with regard to the amount of Sunday work that may be necessary is not required. Changes in amount or nature of traffic or business and seasonal fluctuations must be taken into account. This is not to be taken to mean, however, that types of work which have not been needed on Sundays will hereafter be assigned to Sunday. The intent is to recognize that the number of people on necessary Sunday work may change."

The Agreement thus clearly contemplated the possibility that 7 day positions on more than one shift might be established and the working conditions for such positions were written into the Agreement by the parties; we would be exceeding our authority if we were to add to the conditions negotiated by the parties themselves.

Organization argues that past practice had been that Carrier negotiated before making or attempting to make similar changes in the past. We have

reviewed all the evidence submitted to support this argument and find that while Carrier did discuss on most previous occasions similar to this, it did not negotiate; in all the exchanges between the parties in the past, Organization asserted repeatedly that it was negotiating and that Carrier could not properly make the changes proposed without prior agreement by Organization; Carrier asserted that it was discussing the matters, but refrained carefully from agreeing that it was negotiating or was obligated to negotiate. Some examples are in the record of Carrier making changes similar to those here involved without negotiation with Organization. Thus the evidence of practice does not prove the meaning in Rule 59(c) and 22(f) attributed to them by Organization.

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 Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 26th day of March, 1969.