

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES**

SOUTHERN PACIFIC COMPANY (PACIFIC LINES)

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

(a) The Carrier violated and continues to violate the Rules of the Clerks' Agreement at Fresno, California, when on Saturdays and Sundays, August 13, 20, 27, September 3, 10, 23, 30, and October 7, 1950, and subsequent thereto, it refused and continues to refuse to call Warehouse Foreman, Mr. N. C. Young, to perform service on his position on his rest days, which service was on days not a part of any assignment and regularly assigned to and performed by him during his work week, Monday through Friday.

(b) That Warehouse Foreman, Mr. N. C. Young, shall be compensated at the rate of time and one-half of his assigned position on the dates in part (a) of this Statement of Claim, the number of hours on each date as set forth in the Statement of Facts (Item 4), and for all subsequent rest days until the Agreement violation is corrected.

EMPLOYEES' STATEMENT OF FACTS: 1. There is in evidence an Agreement between the Southern Pacific Company (Pacific Lines) (hereinafter referred to as the Carrier) and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes bearing effective date of October 1, 1940, which Agreement (hereinafter referred to as the Agreement) was in effect on the dates involved in the instant claim. The Agreement was amended and/or revised by a Memorandum of Agreement dated July 8, 1949, and Supplement thereto dated June 30, 1950, which became effective September 1, 1949, to conform with the National 40-Hour Week Agreement signed at Chicago, Illinois, March 19, 1949. Copy of the Agreement of October 1, 1940, and subsequent amendments and/or revisions are on file with this Board, and by reference thereto are hereby made a part of this dispute.

2. Prior and subsequent to the dates involved in the instant claim the Warehouse force at Fresno, California, consisted of one (1) position of General Foreman assigned to perform service as the General Supervisor, 8:30 A. M., to 4:30 P. M., daily except Saturday and Sunday; two (2) positions of Warehouse Foreman, 4:30 A. M., to 12:30 P. M., and 1:00 P. M., to 9:00 P. M., daily except Saturday and Sunday, assigned as direct supervisor, on

In support of its denial of the instant claim, Carrier respectfully directs the Board's attention to this Division's Award No. 4992, involving a claim similar in many respects to the claim in the instant docket, wherein the Board held:

"We think it is within the province of the Carrier to determine the amount of supervision needed to properly expedite the work. If the foreman's position is not required and the supervisory duties of the position can be handled by other supervisory officers who are entitled to perform it, we can find no rule of the Agreement prohibiting such handling. Likewise, if any clerical work performed by the foreman remains, it may be assigned to clerks." (Emphasis supplied)

See also Awards Nos. 5149 and 5509.

CONCLUSION

The carrier asserts that it has established that the claim in this docket is without merit or basis, and that it should be denied.

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

(Exhibits not reproduced).

OPINION OF BOARD: The facts of this case are not dispute but should be stated to insure proper understanding of the single issue involved.

On August 13, 1950, Carrier maintained a warehouse force at Fresno, Monday through Friday, with rest days Saturdays and Sundays.

During the entire period involved in the claim the force employed at the Warehouse consisted of a General Warehouse Foreman, assigned 8:30 A. M. to 4:30 P. M., with other persons employed on two tricks. The first trick, hours 4:30 A. M. to 12:30 P. M. consisted of one Warehouse Foreman, one Foreman's Clerk, six Receiving and Delivery Clerks, one Lift Truck Operator, one Loader and ten Truckers. The second trick, hours 12:30 P. M. to 8:30 P. M. consisted of two Foreman's Clerks, three Receiving and Delivery Clerks, one Lift Truck Operator, one Stower, and five Truckers, also a Warehouse Foreman who was not required to report until 1:00 P. M. but whose tour of duty lasted until 9:00 P. M. A Crane Operator, hours 8:00 A. M. to 5:00 P. M., was also employed.

The regularly assigned General Warehouse Foreman, hereinafter referred to as the General Foreman, was excepted from Rules 27 and 28 of the Agreement relating to Promotion Assignments and Displacements. His duties consisted of overall supervision over the warehouse and forces and the exercise of direct supervision over the warehouse force between 12:30 P. M. and 1:00 P. M., each day, Monday through Friday, at the time when no Warehouse Foreman was on duty.

The duties of the Claimant, N. C. Young, the regularly assigned first trick Warehouse Foreman, whose regularly assigned hours were 4:30 A. M. to 12:30 P. M., Monday through Friday, likewise the duties of one Dyson, the regularly assigned second trick foreman, who had less seniority than Young, were as follows:

"Supervision of forces on duty during their tour of duty; Check loading into cars and trucks; Check cars to see if in proper condition and properly braced; Check to see that cars are protected by blue flag and that other safety practices are observed; Make list of out-bound and inbound cars and check with yardmaster as to when cars will arrive and when loaded cars will be picked up; Supervise making

of over and short and damage reports; Report to agent any unusual conditions, and receive instructions concerning any unusual circumstances from general warehouse foreman and/or the station agent."

It is conceded the positions heretofore described were five day positions under Rule 9(b) of the Agreement, that there was no staggering of forces, that no relief assignments under Rule 9(e) had been established, and that by reason thereof the involved Saturday and Sunday work was work on unassigned days within the contemplation of Rule 20(e) of the Agreement which reads:

"Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

Commencing Sunday, August 13, and continuing each Sunday to and including September 10, then commencing Saturday, September 16, and including October 21, all dates being in 1950, a part of the warehouse force at Fresno Warehouse was worked in order to relieve a serious situation due to shortage of box cars. The work was performed at various times and was of the same nature as that normally performed by the regularly assigned force Monday through Friday. On two Saturdays, September 30 and October 7, the force worked from 4:30 A. M. to 3:00 P. M. On another Saturday, September 23, it worked from 3:30 A. M. to 2:00 P. M. On one day, Sunday, August 27, it worked from 5:00 A. M. to 2:00 P. M. On Sunday, September 10, it worked from 5:30 A. M. to 2:15 P. M. On all other days in question it worked from 5:30 A. M. to 2:30 P. M.

On the dates last above mentioned, except on August 13, which Claimant concedes is no longer involved because he was called on that date and Foreman Dyson was used because of his inability to serve, the Carrier did not call Claimant to perform the work required but used the General Foreman instead, thus giving rise to the instant claim that since it was not performed by an available extra or unassigned employe, Claimant was entitled to such work as the regular employe under and by virtue of the provisions of Rule 20 (e).

While the parties are not in entire accord with respect thereto the record makes it clear that although a small portion of the work performed by the General Foreman was work ordinarily performed by him on the assigned hours of his own position the far greater portion thereof was work normally performed by Claimant, Monday through Friday, as the regularly assigned occupant of the five day Warehouse Foreman position.

Before giving consideration to contentions advanced by Carrier as grounds for denial of the claim it should be stated that since the advent of the 40 Hour week there can be no doubt regarding the force and effect to be given the provisions of Rule 20(e) or others containing similar or identical language. The rule, firmly established by repeated decisions, is that work on rest days should be assigned in the first instance to a regularly assigned relief man if there be such; secondly, to an extra or unassigned employe; and, finally, if such employes are not available to the regular occupant of the position on an overtime basis (see e.g., Awards 5271, 5333, 5465, 5475, 5558, 5708, 5804, and other decisions of this Division of the Board cited therein). Where such work is unassigned work it may be performed in the first instance by extra or unassigned employes; in all other cases by the regular employe.

At the outset Carrier defends against the Claim on the basis its action is warranted by long continued practice, recognized for many years, of selecting both employes and supervisors on the basis of seniority hence, since the occupant of the General Foreman position was senior to Claimant, Rule 20(e) was not violated even if otherwise Claimant would have been entitled to the work in question. The answer to this contention is to be found in Award

5804 holding that any practice existing prior to September 1, 1949, inconsistent with provisions of a rule like Rule 20(e), which became effective when the 40-Hour Week Agreement was placed in force and effect, must be deemed abrogated by such rule. It cannot be denied the practice relied on is inconsistent with the rule and even the Carrier does not contend, indeed if it did the record would not sustain the contention, that practice between September 1, 1949, and August 1, 1950, would sustain the Carrier's position on the point now under consideration.

Touching the merits of the claim the Carrier first contends that the work in question was supervisory work which it could assign to any supervisory employe. This contention lacks merit because, as we have heretofore indicated, the major portion of such work was work which was regularly performed by Claimant after the advent of the 40-Hour Week Agreement on the assigned work days of his five day position.

Next it is argued the general foreman was the "regular employe" within the meaning of that term as used in Rule 20(e). The fallaciousness of all arguments on this point is well demonstrated by frequent statements made by Carrier in its submissions, in its brief, and on oral argument before this Board, to the effect that the Claimant performed only a part of the supervisory duties which were necessary on the Saturdays and Sundays in question on his regular assignment Monday to Friday. The concession, inherent in such statements, that at least part of the unassigned work in question was work normally performed by Claimant on the regular assignment of his five day position, to say nothing of the facts of record disclosing that situation, is enough to compel a conclusion that as to such work the General Foreman was not the regular employe contemplated by the Rule. The fact, as Carrier suggests, that some of the work may have been work regularly assigned to and performed by the General Foreman on the work days of his five day position would not make him the regular employe, within the meaning of that term as used in such rule, for purpose of performing unassigned work of the type or character normally performed on the assigned work days of some other five day position.

Finally, the Carrier insists Claimant is not the "regular employe," contemplated by Rule 20(e). We concede decision of that question is difficult under the confusing facts and circumstances of record and confess we are loathe to hold that he is. At the same time common frankness impels the statement we are convinced that he comes much closer than the General Foreman to meeting that test. Even so we are not required to pass on that question in order to dispose of the claim and hence do not choose to do so. Once it is determined, as we already have, that the unassigned work in question was not assigned to the "regular employe" within the meaning of Rule 20(e) it becomes crystal clear the Carrier's action was in violation of such rule. If, as it contends, Claimant was not the regular employe because not entitled to perform all the involved work its obligation, under the confronting facts and circumstances, was to either assign such work to an available and qualified extra or unassigned employe or to comply with the requirements of Rule 20(e) and assign Claimant on his rest days the work normally performed by him on his five day position. That, in our opinion, is the plain mandate of the rule. Having failed to comply therewith the Carrier must pay the penalty which, under our decisions (see Awards 5271 and 5558), is the straight time or pro rata rate of Claimant's position. The fact, as may be suggested, we have not seen fit to hold that Claimant was the "regular employe" under the facts of record affords Carrier no sound ground for complaint. The essence of this Claim is that its action resulted in a violation of the Agreement, hence it makes little difference who brings the claim to the Board. Claimant or some other employe was entitled to do so and the Carrier cannot be again subjected to a penalty for the same violation of the Agreement.

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 Agreement was violated.

AWARD

Claim sustained as per the Opinion and Findings as to all dates except August 13, 1950.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 26th day of November, 1952.