Award Number 137
Docket Number CL-128

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Wm. H. Spencer, Referee

PARTIES TO DISPUTE:

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

SOUTHERN PACIFIC LINES IN TEXAS AND LOUISIANA

DISPUTE.—"Claim of C. M. Eason, Motor Truck Man, Houston General Stores, for compensation at rate of 51¢ per hour, at time and one-half for services performed as Delivery Leader on Sundays and holidays in the period from March 12, 1934 to date, and for such similar service hereafter performed."

FINDINGS.—The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that—

The carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon, which hearing was held in Chicago on August 21, 1935.

As a result of a deadlock, Wm. H. Spencer was called in as Referee to sit with this Division as a member thereof.

At the written request of the carrier dated November 30, 1935, the Third Division of the National Railroad Adjustment Board permitted representatives of the carrier and the employee, respectively, "to be heard by the Third Division with the Referee sitting as a member thereof." This hearing was held in Chicago on December 18 and 19, 1935. It was understood that in the hearing, the parties would present oral arguments, but would not introduce new evidence, relating to the issues of the controversy. Although some factual statements were made in the hearing on December 18 and 19, 1935, the Division bases its present award on the record as it was made up when the Referee was called in.

HISTORY OF THE CONTROVERSY.—In 1915 the carrier was employing two motor truckmen to deliver materials from its stores at Hardy Street in Houston, Texas. On January 17, 1922, the carrier created two additional positions of motor truckmen at this point. In February 1925, it established shops and stores in Englewood, in or near Houston, and transferred to the new location a part of the force, including the two newly created positions of motor truckmen, formerly employed at Hardy Street. In March 1934, the carrier assigned C. M. Eason, petitioner in the present controversy, to one of the positions created January 17, 1922 and later transferred to Englewood. Eason still holds this position.

As early as 1915, it had been the practice of the carrier at the Hardy Street stores to pay its motor truckmen a flat monthly salary, and to require them to work seven days a week except when the conditions of the service permitted their being excused on alternate Sundays and holidays. From 1925 until 1928, the carrier did not require the motor truckmen at Englewood to work on Sundays or holidays. In 1928, the carrier placed a tractor in operation at the Englewood stores and required its operator to work seven days a week, including Sundays and holidays. When the operator was absent on Sundays or holidays, the carrier required the motor truckmen to operate the tractor without extra compensation. In 1932, the management required the motor truckmen at Englewood regularly to alternate on Sundays and holidays to relieve a delivery leader. For this service, the carrier provided no extra compensation. The practice of requiring motor truckmen to work seven days a week, including Sundays and holidays, continued unbroken at the Hardy Street stores down to the beginning of this controversy. Beginning in March 1934, when C. M. Eason was assigned to the position of motor truckman at Englewood, the carrier

required him, without extra compensation, to alternate with another motor truckman on Sundays and holidays in place of H. C. Perkins, a delivery leader.

The duty of motor truckman is to operate a small truck in the delivery and collection of storehouse materials; that of the delivery leader is to supervise a small gang of laborers in the delivery and collection of stores. As a motor truck driver, C. M. Eason received $91.84 a month, whether he worked six or seven days a week. H. C. Perkins, as delivery leader, was paid at the rate of 51 cents per hour.

On several occasions, in the period between 1921 and March 6, 1935, representatives of the Brotherhood of Clerks had raised with the carrier, the question whether the agreement between them covered motor truckman. Prior to March 6, 1935, however, neither the Brotherhood nor the motor truckmen had lodged any protest with the management as to the manner in which motor truckmen were paid, or had claimed that the motor truckmen were entitled to extra compensation for services performed on Sundays and holidays.

On March 12, 1935, General Chairman H. W. Harper of the Brotherhood of Clerks, in a letter addressed to Assistant General Manager Torian of the Southern Pacific Lines in Texas and Louisiana, presented the claim of C. M. Eason for extra compensation, basing the claim upon Rule 52 of the Agreement between the parties. On March 27, 1935, Mr. Torian replied denying that motor truckmen were covered by the Clerks' Agreement. On the following day, General Chairman Harper replied to Mr. Torian, setting forth at some length reasons in support of his contention that motor truckmen were included in the Agreement.

During a period of six or seven weeks immediately preceding April 12, 1935, General Chairman Harper had several conferences with representatives of the carrier on the general question whether the Clerk's Agreement included motor truckmen. As a basis for the discussion of the broader issue, the specific claim of C. M. Eason and certain other employees were laid before the management. It does not appear, however, that the parties discussed the merits of the individual claims, particularly the claim of Eason that he be granted time and one half at the rate of 51 cents per hour for the Sundays and holidays which he was required to work in the place of H. C. Perkins, delivery leader. It must be remembered, however, that from the outset of this controversy the carrier denied that motor truckmen were covered by the Clerks' Agreement.

POSITION OF EMPLOYEE.—In support of the claim under consideration, these contentions were presented on behalf of the employee:

(1) Motor truckmen are included under the Clerks' Agreement by virtue of Rule 1 (3) which provides:

> "RULE 1. These rules shall govern the hours of service and working conditions of the following employees, subject to the exceptions noted below.
>
> "(3) Laborers employed in and around stations, storehouses, and warehouses."

(2) C. M. Eason, being regularly employed as a motor truckman for 204 hours a month or six days a week, the carrier could not on Sundays and holidays assign him to the position of delivery leader, regularly filled by H. C. Perkins at 51 cents per hour, except upon compliance with Rules 51 and 52 of the Agreement:

> "RULE 51. Positions (not employees) shall be rated and the transfer of rates from one position to another shall not be permitted."
>
> "RULE 52. Employees temporarily or permanently assigned to higher-rated positions shall receive the higher rates while occupying such position; employees temporarily assigned to lower-rated positions shall not have their rates reduced."

(3) C. M. Eason, having been called to work on Sundays and holidays over and above his required service as a motor truckman, is entitled to time and a half for such time at the rate of 51 cents per hour. In support of this contention, the employee relies upon Rules 44, 45, and 38 of the Agreement.

POSITION OF THE CARRIER.—In opposition to the claim under consideration, these contentions were presented on behalf of the carrier:

(1) The Amended Railway Labor Act of June 21, 1934, is unconstitutional insofar as it purports to give the National Railroad Adjustment Board jurisdic-

tion over the grievance of an employee who, although employed by an interstate carrier, is engaged solely in intrastate commerce.

(2) The procedures established by the Board, particularly those governing ex parte submissions of disputes, did not afford the carrier a fair hearing, and are, therefore, unconstitutional.

(3) The Third Division of the Board has no jurisdiction over the alleged grievance of C. M. Eason because he is not included under the Agreement between the Clerks and the Carrier.

(4) This dispute, although the Third Division may have jurisdiction over it, is not properly before it.

(5) Assuming that the dispute is properly before the Division, the employee is not entitled to time and a half at the rate of 51 cents per hour.

(6) In any event, the claim is outlawed by reason of the employee's failure to present it to the management within the time allowed by Rule 27 (a) of the Agreement between the parties.

OPINION OF THE REFEREE.—It is the general conclusion of the Division that C. M. Eason, as a motor truckman, is included under the Agreement between the Brotherhood of Clerks and the Carrier.

The record of the controversy is voluminous, the issues multifarious, and the arguments finely spun. While it will serve no useful purpose to examine the record in great detail, the Referee will devote some attention to the principal issues.

CONSTITUTIONAL ISSUES.—The Division must assume that the Amended Railway Labor Act of June 21, 1934, under which it functions, is constitutional. This is an issue on which courts alone can pass judgment. The carrier, if convinced that the legislation is for any reason unconstitutional, can secure a decision of the federal courts on the issue or issues by refusing to comply with the Division's award, thus compelling the petitioner to sue upon it. An administrative board must, it would seem, assume the validity of a law to which it owes its existence.

What has been said concerning the constitutionality of the legislation may also be said concerning the fairness of the rules of procedure followed by the Board in ex parte submissions. In passing, however, it may be said that the record of the controversy bears testimony to the fact that the carrier has had ample opportunity to present both evidence and arguments.

SCOPE OF THE AGREEMENT.—Whether the Agreement between the Brotherhood of Clerks and the Carrier includes motor truckmen is, of course, the principal issue in this controversy. The phraseology of the Agreement relating to this issue is not entirely clear, and there was a sharp conflict in the evidence as to what the parties themselves conceived the proper scope of the Agreement to be.

Aside from other considerations, the Referee is of the opinion that the language of Article I, fairly interpreted, includes motor truckmen. This article describes the general classes of employees embraced by the Agreement: (1) Clerks, (2) Other office and station employees, and (3) "Laborers employed in and around stations, storehouses, and warehouses", Motor truckmen are, in a broad sense, laborers, and are certainly employed "in and around stations, storehouses, and warehouses." They are carried on the payroll of the storehouse to which they are attached ,and are under the control of the storekeeper. This conclusion is fortified by the fact that paragraph 3 of Rule 1 is followed by a listing of certain employees who are not embraced by the Agreement. These exceptions do not include motor truckmen. If the framers of these rules had intended to omit motor truckmen from their operation, they would have listed them under "Exceptions." The failure so to list them strongly suports the conclusion that the framers of the rules intended to include motor truckmen as "laborers employed in and around stations, storehouses, and warehouses."

In further support of its position that Rule I (3) includes motor truckmen, the employee cites three decisions of the United States Railroad Labor Board, Nos. 2, 147, and 1074, to all of which the Brotherhood of Clerks and the Carrier were parties. These decisions specifically referred to "station, platform, warehouse, transfer, dock, truckers, and other similarly employed" as falling under the Clerks' Agreement. In 1922, the carrier asked for a reduction in wages of employees covered by the Clerks' Agreement and in the ex parte submission of its claim to the United States Railroad Labor Board included motor truckmen among other employees whose wages would have been reduced under

its proposal. Again, in November 1922, when the Brotherhood asked for an increase in wages, the carrier recognized the motor truckmen as being included in the request.

In opposition to the conclusion that motor truckmen are covered by the Clerks' Agreement, the carrier placed considerable emphasis upon a letter which Mr. Torian, following conferences on the issue, wrote to Mr. King, then general chairman, February 4, 1921, in which Mr. Torian stated:

> "At conference February 3, you advised that the above case (request that the Agreement be construed to include motor truckman) was withdrawn and I am therefore closing the file."

The carrier presented no evidence indicating that it received any reply from Mr. King to this communication. The Brotherhood was unable to furnish any explanation of the letter, and asserted that a thorough search of its files failed to indicate that the communication was ever received. On its behalf, however, it was pointed out that on January 21, 1922, the carrier, in asking for a reduction in wages, and again on November 22, 1922 in resisting a demand by the Brotherhood for an increase in wages, recognized that motor truckmen were covered by the Clerks' Agreement.

In support of its position, the carrier also called the Division's attention to an affidavit made by General Chairman Harper, in the year 1923, in connection with a dispute over representation, in which Harper stated that truckmen and certain other employees would not be eligible to vote in an election which was under contemplation. In connection with the same dispute, however, G. S. Waide, a Vice President of the carrier, made an affidavit in which he stated that certain employees, including motor truckmen "are each and all clerical employees and eligible as members in either the Brotherhood or the Association (referring to a company union). Their working conditions and rates of pay are fixed by clerks' agreements." In view of the peculiar circumstances of this controversy, particularly in view of the fact that the controversy seems to have revolved around the matter of representation of clerical employees within the meaning of Article I (1), neither affidavit has great evidentiary value beyond indicating that as late as 1923 or 1924 the parties had not reached a clear understanding as to the appropriate scope of Article I of their Agreement.

In further support of its position, the carrier called the Board's attention to the fact that for many years it has paid motor truckmen in the manner previously indicated, that it has required them to work on Sundays and holidays without extra compensation, and that it does not carry the names of motor truckmen on the seniority lists of employees covered by the Clerks' Agreement. The carrier called particular attention to the fact that from about 1924 until March 12, 1935, when General Chairman Harper presented the claim of C. M. Eason, neither the Brotherhood nor the motor truckmen had pressed for a settlement of the issue under consideration. These facts, while significant, have little probative value tending to prove the scope of the Agreement. A party to an agreement cannot revise it by repeated violations of it. It must be remembered, moreover, that during the period from about 1923 until 1930 when in *T. & N. O. R. Co.* v. *Brotherhood of Railway and Steamship Clerks* (281 U. S. 548, 1930), the Supreme Court of the United States reestablished it as a bargaining agency, the Brotherhood was waging a bitter struggle with the carrier for its very existence. It is a matter of record that the carrier in this controversy never established an adjustment board on its lines as required by Section 3 of the Railway Labor Act of 1926. It was not until the Railway Labor Act of 1934 set up the National Railroad Adjustment Board that the Brotherhood had any tribunal to which it could take grievances. In these circumstances, the delay of the Brotherhood in pressing for a settlement of the issue under consideration loses its significance.

IS CONTROVERSY PROPERLY BEFORE BOARD.—The carrier contends that the controversy is not properly before the Third Division of the Adjustment Board.

In support of this contention, the carrier, in the first place, contends that under Rule 27 of the Agreement the employee should have presented his claim to the management in person. The carrier also contends that this has been a historic practice on its lines. Even assuming that Rule 27 has any application to the presentation of this type of claim, the rule in question certainly does not require that the employee shall present his claims or grievances in person.

Moreover, the requirement, whether based upon a rule in the Agreement or a practice of the carrier, that the employee should present claims and grievances in person would materially impinge upon his statutory right to be represented by representatives of his own choosing. The fact that the claim in this case was originally presented by General Chairman Harper is immaterial.

In further support of its position that the controversy is not properly before the Adjustment Board, the carrier urges that the petitioner failed to comply with the procedures prescribed by the Railway Labor Act before submitting a claim or grievance to the Board. The carrier called particular attention to the second paragraph of Section 2 and Section 3 (i) of the Act. The former provides:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 3 (i) provides that disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes."

The carrier also called the Board's attention to its own rule, published October 10, 1934, in Circular No. 1:

> "No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934."

The carrier urges that the controversy is not properly before the Board because the petitioner did not comply with the foregoing requirements.

The requirements that disputes, before being submitted to the Adjustment Board, shall be the subject matter of a conference between representatives of management and representatives of employees and shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes, are salutary requirements and should be observed both in letter and in spirit. Underlying them, is the policy that the government should not interfere in the relationship between employer and employee until they have exerted all reasonable effort to settle their disputes. To effectuate this policy, the statute not only requires that the dispute shall be handled through certain officials of the carrier, but that it shall be the subject matter of conference. The term *conference* clearly implies something more than letter writing; it implies personal, and perhaps more or less formal, discussions by participants. In the opinion of the Referee, it was undoubtedly the thought of the framers of this legislation that the parties to a dispute should be compelled to discuss it face to face before appealing to the Adjustment Board for assistance.

The major issue in this controversy, whether Motor Truckman Eason is covered by the Clerks' Agreement, was brought to the attention of the management in the manner prescribed by the Railway Labor Act of 1934. The correspondence which took place between General Chairman Harper and Assistant General Manager Torian in March and April of 1935 related primarily to this broad issue. Attention is particularly called to General Chairman Harper's letter of March 28 to Mr. Torian in which he set forth at great length arguments in support of his contention that motor truckmen were included under the Agreement.

The record indicates that the issue has not only been considered by the parties through correspondence but that it has been the subject of conference between them. It was the subject of conference between the parties as far back as 1921. It was the subject of conference between the parties in connection with the controversy over representation in 1923. There is evidence in the record which justifies the conclusion that the issue in question was the subject of conference between Mr. Montgomery, Supervisor of Wages, and General Chairman Harper during March and April of 1935 before the Brotherhood had filed its notice of intention to submit an ex parte statement of the controversy with this Division.

With some regret, however, the Referee reaches the conclusion that that part of C. M. Eason's claim which relates to compensation is not properly before the Board. Although the correspondence between Mr. Harper and Mr.

Torian was in relationship to C. M. Eason's claim for extra compensation, the actual discussion centered around the issue whether he was under the Clerks' Agreement. The record contains no evidence justifying the inference that the merits of Eason's claim were ever the subject of correspondence or conference prior to the time when the controversy was submitted to this Division for settlement. Indeed, the record clearly indicates that the carrier had no formal notice that the petitioner was making a claim for time and one half at the rate of 51 cents per hour until the Brotherhood had filed its first paper with this Division.

The Referee regrets that he is forced to this conclusion because of the delay which it is likely to entail in the ultimate settlement of this controversy. It may be admitted that an immediate decision of the Division on the merits of Eason's claim for compensation would neither take the carrier by surprise nor cause it any damage. It may also be admitted that the reason why the claim for compensation was not considered on its merits was the carrier's refusal to recognize the Brotherhood of Clerks as a bargaining agency for motor truckmen. At the same time, the requirement that such issues shall be considered in conference between management and employees before submission to the Adjustment Board is not a mere technical requirement. As previously pointed out, it is based upon sound policy. In the circumstances, the Referee hesitates to take responsibility for passing judgment on issues which have not been fully considered in conference between the parties.

OTHER ISSUES.—In the view that the Division has taken of this controversy, it is not necessary for it at this time to consider the other contentions made by the parties. These are matters for further negotiations between them.

AWARD

It is the judgment of the Third Division of the National Railroad Adjustment Board that Motor Truckman C. M. Eason is included under the Clerks' Agreement. His claim for compensation at the rate of 51 cents per hour, with time and one half, are remanded for further negotiations without prejudice because of this decision.

By Order of Third Division:

NATIONAL RAILROAD ADJUSTMENT BOARD.

Attest:

H. A. JOHNSON,
Secretary.

Dated at Chicago, Illinois, this 2nd day of January 1936.