Award No. 794
Docket No. CL-778

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Dozier A. DeVane, Referee

PARTIES TO DISPUTE:

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

THE NEW YORK DOCK RAILWAY

STATEMENT OF CLAIM: "(1) Claim of the System Committee of the Brotherhood that employes of the New York Dock Railway, whose positions were abolished on Dec. 4th, 1937, be compensated for six (6), eight (8) hour days, in accordance with the provisions of Section C, Paragraph 6A and Section E, Paragraphs 1 and 6 of current agreement, retroactive to December 4th, 1937.

"(2) Claim of the System Committee of the Brotherhood that employes be paid a minimum of eight (8) hours per day for such days worked and paid less than eight hours, since December 4th, 1937."

EMPLOYES' STATEMENT OF FACTS: "Prior to December 4th, 1937, all employes covered by working Rules Agreement of October 28th, 1937, were regularly assigned eight (8) hours per day, six (6) days per week. On the afternoon of Dec. 4th, 1937, five junior, regular assigned employes were verbally advised that at the close of business that day, they were layed off and if they would report each day and hold themselves available, the Management might use them two (2) hours, if volume of business required such service. This practice was followed on Dec. 11th with respect to four (4) other employes. Employes whose positions were abolished, December 18th and 20th, 1937, were able to exercise seniority over junior employes. When protest was made, Management contended the positions were not abolished and that Group 2 employes are not governed by the provisions of Section C, Paragraph 6A and Section E, Paragraphs 1 and 6 of current agreement.

"The following employes were verbally advised a few hours before the close of business on the following dates, that their services thereafter would be subject to the management's discretion as outlined above.

EMPLOYE	POSITION	RATE	DATE ABOLISHED
P. McCarthy	Freight Handler	60¢ per hour	Dec. 4, 1937
T. Biernik	" "	" " "	" " "
L. Vastola	" "	" " "	" " "
C. White	" "	" " "	" " "
G. Calise	" "	" " "	" " "
T. McCarthy	" "	" " "	" 11, "
G. Perino	" "	" " "	" " "
T. Stepion	" "	" " "	" " "
G. Bronson		" " "	" " "
F. Stone	Del. Clerk	70¢ " "	" 20, "
J. Freund	Yard "	60¢ " "	" 18, "
H. Muckler	" "	" " "	" " "

hourly (see Rule B (1)) Group (2) employes as set forth above are recognized throughout as hourly employes. It has not been the practice for many years to keep the freight houses open on Saturday afternoons. Since the men are hourly rated they are paid only for time worked except as provided in Rule E (8).

"Rules E (1) and (6) are apparently relied on in support of this claim. Section E of the rules has the descriptive heading 'Time Assignments.' Its recognized purpose was to establish standard work periods, meal hours, starting times, overtime period, etc. To attempt to read into this section establishment of a different basis of pay than that provided in Section B is deliberate perversion of the rules." * * * *

"This carrier's position in respect of the first part of Claim No. 1 is:

1. Group (2) employes are hourly employes not holding regularly assigned positions and not subject to the provisions of Rule C-(6) (a) respecting abolishment of positions, and

2. No positions were abolished by the notification of certain Group (2) employes on December 4, 1937 and December 11, 1937, not to report for work until further notice.

"This carrier's position with respect to the second part of Claim No. 1 is:

> No obligation was assumed by this carrier to pay Group (2) employes for any time not worked and the rules under Section E, 'Time Assignments,' designed in so far as they apply to these employes to preserve for them the maximum amount of work available, cannot be perverted to sustain a claim for payment of such employes except for actual hours worked. The carrier has undertaken specifically to give these men preference in the work available and to make every effort to handle a fluctuating volume of work with minimum fluctuations in the force."

OPINION OF BOARD: The agreement in this case was a new one—having been in effect less than forty days—when this controversy arose and the record discloses a sharp disagreement between the parties as to its meaning and effect. Certain important facts in relation to the case are also sharply at issue between the parties and as they waived oral hearing and the Board did not require one they remain unreconciled.

Petitioner states that five certain junior employes, regularly assigned freight handlers, were informed in the afternoon of Saturday, December 4, 1937, that they were laid off and if they would report each day and hold themselves available, they might secure two hours' work if the volume of business required their services; that on December 11, 18, and 20, certain others of this same class of employes were likewise laid off.

Carrier states that these employes were simply told there would be no work for them until further notice and denies that they were notified to report each day for a possible two hours' work. Carrier took this action in the belief that hourly rated employes, which includes these freight handlers, are not regularly assigned and that Rule E (8) completely covers carrier's obligation to them.

Petitioner claims that under the provisions of Section C, Paragraph (6) (a) these employes were entitled to six days' notice of the abolition of their positions. This rule states that employes whose positions are abolished shall receive six days' notice.

In support of its claim that Section E (8) covers its obligation to all hourly rated employes carrier contends that Group (2) employes, which includes these employes, do not hold regularly assigned positions and accordingly the rules applicable to such positions are not applicable to them. But Section D (2) of the agreement completely refutes this contention. This subsection pro-

vides that Seniority rosters of **all employes by groups** as shown in Section A (Groups 1 and 2), showing names, **positions occupied** and seniority date will be posted, etc. Moreover Section E (8) is applicable to "hourly rated employes in the freight houses and platforms" and there is nothing in the record which indicates that Group (2) includes all such employes or that only employes of the class here being considered (freight handlers) are hourly rated.

Agreements such as the one under which this case is brought commonly contain a rule providing for work of less than eight hours for employe of the classification here involved, but all such rules that have come to our attention refer to work to be performed that cannot be handled by the "regular force" or "regularly assigned force" which term has been construed to mean a force of employes regularly assigned to such work (See Awards 438 and 737). As pointed out above Section E (8) of the current agreement does not classify all freight handlers as an itinerant force. The rule sets up a condition of 60 regular working days continuous employment before such employes shall be entitled to preferment in employment. This in effect establishes their seniority. In the absence of any exception in the agreement Paragraph 6 (a) of Section C is held to apply to all such employes who have earned such preferment and were working with regularity at the time of the abolition of their positions. Under this rule of the agreement the employes who were so employed were entitled to six days' notice of the abolition of their positions.

Carrier further contends that under Section E (8) of the agreement these employes would not have been entitled to eight hours' pay each day had their positions not been abolished, and they do not become entitled to any greater compensation by reason of their positions having been abolished without the required six days' notice. What we have already said as to the application of Sections C (6) (a) and D (2) to these employes makes such a contention untenable. As regularly assigned employes they were entitled to a minimum of eight hours' consecutive work six days per week as guaranteed by Section E (1) and (6) of the agreement. Carrier's failure to apprehend the full effect of these provisions of the agreement upon its hourly rated employes affords no basis for relief here.

Petitioner also claims that these same employes, worked and paid on certain days since Dec. 4, 1937, less than eight hours per day, should be paid a minimum of eight hours for each day worked. What we have said above also disposes of this claim. As heretofore pointed out, the agreement contains no provision for work of less than eight hours and in the absence of such provision, employes, subject to the agreement, who are required to work, become entitled to the eight hour guarantee contained in Section E (1) of the agreement. In this connection, attention is directed to Section F (2) of the agreement where carrier agrees to continue its practice with respect to vacation allowances, release of employes not necessary for its operations on Saturday afternoons, and acceptance of less than eight (8) hours as a day's work in certain positions, without deduction in pay, as long as such practices do not result in impairment of service or additional cost to the carrier.

The Board has given careful consideration to the contentions of carrier as to the intent of the parties when the agreement was negotiated and executed but finds it impossible to give effect to such intent in face of the clear language 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 claims of the employes are sustained as outlined in the Opinion.

AWARD

Claims sustained as outlined in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 16th day of January, 1939.

DISSENT ON AWARD 794

In the "Opinion of Board" the majority finds it impossible to reconcile the facts of the case and the positions of both parties with the terms of the Agreement. Apparently without considering the possibiliy that both parties to the case are taking an extreme position and that known facts and the rules can be applied, yielding a solution that does violence to neither, they seem to proceed with the end in view of reconciling the position of the petitioner with the rules if possible and, if not, of rejecting such rules as present obstacles to that purpose. In any event it cannot be gainsaid that that is the net result of the Award.

In the third paragraph of the Opinion it is stated that the carrier took the action complained of in the belief that hourly rated employes are not regularly assigned and that Rule E-(8) covers its obligation to them. In the fifth paragraph it is stated that Section D-(2) completely refutes this contention. The rule Section D-(2) reads:

> "Seniority rosters of all employes by groups as shown in Section A, showing names, position occupied and seniority date, will be posted in a place accessible to all employes. The rosters will be posted in January 1938 and will be open to protest for a period of sixty (60) days therefrom and kept current thereafter. Upon presentation of proof of error by an employe or his representative, such error will be corrected. Employes promoted or transferred from one roster to the other will retain and continue to accumulate seniority on their home roster."

Manifestly Section D-(2) carries no such refutation, as the rule does not provide for elimination from the seniority roster of names of employes not entitled to hold regular assignments. No provision is to be found here or elsewhere in the Agreement that furloughed or extra employes will not be carried on the seniority rosters.

Continuing, the fifth paragraph of the Opinion states that Section E-(8) is applicable to hourly rated employes in freight houses and platforms and that nothing in the record indicates that Group (2) includes all such employes or that only employes of the class here being considered are hourly rated. Apparently strength is sought from this statement to combat the carrier's contention that Section E-(8) was added "to clarify the hourly employment status of Group (2) employes." It might suffice to cast doubt on that contention if it were in consonance with the evidence before the Board. In view of it, the deletion from the quoted portion of the record of a pertinent part of the carrier's statement of its position, contained in its orginal submission, becomes significant. The omitted paragraph reads:

"In general support of the contention of the carrier respecting the hourly status of its Group (2) employes under existing agreements, reference is made to the Memorandum of Agreement With Respect to Rates of Pay of Clerical and Freight House Employes of New York Dock Railway, signed November 9th, 1937, filed herewith as exhibit J. Under this agreement the rate of pay of freight house checkers, receiving and delivery clerks was fixed at 70¢ per hour **and all other Group (2) employes** at 60¢ per hour, an increase of 5¢ per hour in each division. The latter rates compared with the prevailing rates of 64¢ and 58¢ after the general increase of 5¢ per hour by the railroads. The higher rates of pay for employes of this carrier were accepted by both sides as adequate compensation under the hourly employment conditions to offset the privileges of employes of other carriers in respect of minimum pay, vacation allowances, etc." (Emphasis added).

Exhibit "J" is as follows:

"MEMORANDUM OF AGREEMENT WITH RESPECT TO RATES OF PAY OF CLERICAL AND FREIGHT HOUSE EMPLOYES OF NEW YORK DOCK RAILWAY

Effective October 1st, 1937, present rates of pay of employes shown in Group (1) under Section A of Schedule of Rules dated October 28th, 1937, shall be increased 5¢ per hour, or $10.20 per month.

Effective October 1st, 1937, rates of pay of employes in Group (2) under Section A of the Schedule of Rules shall be as follows:

Freight house checkers, receiving and delivery clerks	70¢	per hour
Yard clerks	60¢	" "
Chauffeurs	60¢	" "
Freight handlers and manual workers in and around freight houses	60¢	" "

It is also understood that on or before December 1st, 1937, the management proposes to put into effect plans designed to establish a more efficient and satisfied force in Group (1) employes, which plans include rearrangement of duties and responsibilities, and reduction in number. It is further understood that for the purpose of such decreases in number the seniority provisions of the Schedule of Rules may be waived in individual cases by agreement between the management and the Local Committee. Effective December 1st, 1937, the rate of pay of each position in Group (1) is to be increased by an amount relative to the increase previously suggested by the Local Committee for such position and in such proportion thereto as the sum of $10.20 times the number of positions at that time shall bear to the total suggested for such positions.

Signed November 9th, 1937.

For NEW YORK DOCK RAILWAY

D. L. Tilly
President.

For the Clerical and
Freight House Employes of
New York Dock Railway

Thomas McCarthy
J. A. Rayll
Ernest C. Gilles
Local Committee

L. B. Snedden
THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES

Edward A. Lanza
C. W. Wysong"

The petitioner, in a rebuttal brief, in answer to the carrier's submission, takes no exception to this evidence. It therefore stands as a statement of fact.

In the above quoted statement the carrier enumerates certain Group (2) employes where rates were fixed at 70¢ per hour and then says, "all other Group (2) employes" were to be paid 60¢ per hour. The Agreement, Exhibit "J" confirms the statement as to Group (2) employes and in the concluding paragraph confirms the monthly rating status of all Group (1) employes. The omitted portion of the record, therefore, carries a complete refutation of the statement contained in the Opinion.

In the seventh paragraph it is stated that the carrier contends that under Section E-(8) these employes would not have been entitled to eight hours' pay each day had their positions not been abolished and they do not become entitled to any greater compensation by reason of their positions having been abolished without the required six days' notice; and, the Opinion continues, what has previously been said with respect to the application of Sections C-(6)-(a) and D-(2) make such a contention untenable. The first sentence of this paragraph is not taken from the carrier's contention in this case but from a proposed award offered for the referee's consideration which gave weight and meaning to every provision of the agreement without doing violence to any of them by a fantastic interpretation. The sentence referred to consists of two separate statements taken from the proposed award and apparently subjoined in the Opinion in order to say of both propositions that the previous analysis of Sections C-(6)-(a) and D-(2) makes the contention untenable.

The second proposition, in full, was:

> "They *do not* become entitled to any greater consideration in the matter of pay by reason of their positions having been abolished without the six days' notice, as required by the rules, than they would have been entitled to receive had their positions not been abolished."

Admitting that the employes here concerned were entitled to six days' notice of the abolition of their positions, the second proposition remains true unless there is some definite provision of the agreement to the contrary, and nothing contained in the Opinion and nothing that can be said of Sections C-(6)-(a) and D-(2) can refute it or make it untenable. Rule C-(6)-(a) provides for six days' notice of abolition of positions. As previously pointed out, Rule D-(2) provides merely for the posting of seniority rosters, and no support can be found in either of these rules for the proposition that the employes here concerned were entitled to eight hours' pay daily under any circumstances, nor does what goes before in the Opinion deal even remotely with either of the propositions contained in the first sentence of paragraph seven. Paragraph four of the Opinion deals with Section C-(6)-(a) and merely states what the rule provides, that employes whose positions are abolished shall receive six days' notice. The fifth paragraph deals with Section D-(2) and with respect to it merely emphasizes that seniority rosters shall include all employes by groups. The petitioner did not rely upon either of these rules to combat the carrier's contention that Group (2) employes are not entitled to eight hours' pay daily. The carrier cited Section E-(8) and the interpretation of it, which it claimed was contemplated in the negotiation of the agreement as justifying its action. If the language of Section E-(8) gave support to the carrier's interpretation, or if the carrier's interpretation of it, said to have been understood during negotiation of the agreement, had been conceded by the employes instead of being sharply disputed, a fair consideration of the claim must have resulted in its outright denial. However, in view of the sharp controversy as to the meaning of Rule E-(8), it became the duty of this Board at least to accept its literal language and undertake to make such application of it and other rules of the agreement as would leave all of them intact and not subjected to fantastic interpretations.

Reading all of the rules together, respecting the plain language in which they are written, they can be construed to give a reasonable meaning to all of their provisions, leaving none of the provisions of any of the rules meaningless or inexplicable, and preserving to the parties to the agreement all of the rights and privileges to which the agreement entitles them. Such an award would have found that the employes concerned in this claim were entitled to six days' notice of the abolition of their positions. It would have found that Section E-(8) is an exception with respect to Group (2) hourly rated employes from certain other provisions of the Agreement; first, that these employes have no seniority rights until they have been in continuous employment for sixty regular working days; second, having attained seniority rights they must be given preference in employment and the carrier must make every reasonable effort to handle its work without increasing the force; third, as to such employes (who have acquired seniority rights) when they are required to report for work at the regular starting time and released because there is no work for them to do, they shall be paid a minimum of two hours. It is clear by this rule that no obligation is assumed toward these employes until they have acquired seniority rights. Then, if they are required to report for work at the regular starting time and are not afforded employment, they shall receive two hours' pay. An appropriate award would have paid respect to this provision of the Agreement and awarded these employes two hours' pay for the six days next succeeding the abolition of their regular daily employment, if they were found to be entitled to preference in employment under Section E-(8) and were not worked on such days.

Such an award would have left Section E-(8) fully operative within the scope of its plain intent. In the award before us the majority, by an untenable interpretation, undertake to render it meaningless.

/s/ Geo. H. Dugan

The undersigned concur
in the above Dissent:

/s/ A. H. JONES

/s/ J. G. TORIAN

/s/ R. H. ALLISON

/s/ C. C. COOK

Response of Referee to Dissent

At the very threshold of this case, the Board was met with the admission of the Carrier that Section E-(8) is not applicable to employes holding regularly assigned positions. The case had its genesis in a disagreement between the parties as to whether hourly rated employes hold regularly assigned positions and are subject to Section C-(6) (a) with respect to the abolishment of their positions. The justification of Carrier's action in the premises depended entirely upon the determination of this question in its favor. It is the unanimous opinion of the Board that hourly rated employes do hold regularly assigned positions, and are subject to Section C-(6) (a) of the prevailing agreement.

The theme of the dissent seems to be that since the Board has determined that hourly rated employes do hold regularly assigned positions, to give a reasonable meaning to all provisions of the agreement, it must also hold that Section E-(8) is applicable to such employes and creates an exception with respect to them as to the applicability of certain other provisions of the agreement. To so hold would constitute a modification and not an interpretation of the agreement, and it is not within the province of this Board, nor has it the power to modify the terms of the agreement. That power resides only in the parties thereto. If the dissent could be interpreted as a finding that the agreement is inequitable, I could readily concur in such in such a finding.

The agreement does not fit the situation on this property. But to interpret the agreement as suggested in the dissent would not remove its inequities—it would only relieve Carrier of some of the inequities applicable to it in violation of the plain terms of the agreement.

It appears unnecessary to comment upon that part of the dissent which criticizes certain deductions made in the majority opinion from facts of record in this case other than to say that while the majority does not agree with the deductions made by the minority, the particular facts involved in no wise affect the conclusions reached as to the terms of the agreement.

Dozier A. DeVane