Award No. 1570
Docket No. CL-1483

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

George E. Bushnell, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: "1. Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that the Carrier violated the Clerks' Agreement at Buffalo, N. Y. when it required the employes to cease work prior to the expiration of their tour of duty of eight (8) hours and failing and refusing to permit the employes to complete their assigned tour of duty.

2. Claim of the employes that they be reimbursed for any and all wage loss sustained by reason of the Carrier's action in denying them the right to work and be paid for the balance of their tour of duty.

"3. It is the further claim of the employes that they be reimbursed for this violation of the Clerks' Agreement and all other violations that have taken place since the filing of this claim until such time as the Carrier permits the employes to complete their assignments and be paid for such service."

EMPLOYES' STATEMENT OF FACTS: "Prior to November 14, 1939, Roster 'B' employes assigned to work eight (8) hours per day at Buffalo, N. Y. were worked the full number of hours of their assignments. They were paid the tonnage rate for the hours worked on tonnage and their established hourly rate for the balance of their assignment.

"Effective November 14, 1939, and subsequent thereto, Roster 'B' employes were and have been released prior to the expiration of their assignments or regular tour of duty, their compensation being reduced accordingly."

POSITION OF EMPLOYES: "Rule 21 of the Clerks' Agreement reads as follows:

> 'Except as otherwise provided in these rules, eight (8) consecutive hours' work, exclusive of meal period, shall constitute a day's work.'

is designed to designate what constitutes a day's work. There is nothing in this rule that provides less than eight hours shall constitute a day's work. It, therefore, cannot be reasonably denied that the carrier violated this rule when they arbitrarily sent employes, who were assigned to work eight (8) hours per day, home in advance of the close of their working day.

"Rule 25 of the Clerks' Agreement reads as follows:

> '(a) Regularly assigned Roster "B" platform positions will be established quarterly as follows:

"This matter is being handled at Louisiana Street freight house, Buffalo, N. Y. in the same manner in which it is being handled at other freight stations on the railroad, it being generally recognized that this practice is in accord with Rule 25 (f) of the Rules and Regulations effective September 1, 1936. It is apparent that this claim is being progressed to the Third Division by the employes for the purpose of establishing a new interpretation of Rule 25 (f) or establishing a new rule, and we believe the claim should be denied for the following reasons:

"1. There has been no violation of any negotiated rule with the employes.

"2. The employes were compensated for their entire tours of service, in accord with Rule 25 (f) even though they were released and permitted to go home prior to the expiration of their full eight hour or four hour tours.

"3. There is no rule that compels the Railroad to pay additional time when no service is performed by the employes involved, and the employes are not held waiting for work.

"4. The employes are paid the tonnage or piece work rate for the actual tonnage handled each payroll period at the specified tonnage rate, and in no case are they paid less than they would have earned each payroll period at their specified hourly rate for their eight or four hour tours.

"5. Previous settlement of a claim of like nature."

OPINION OF BOARD: Decision turns primarily on the interpretation of Rule 25 (f) in the light of Rules 21 and 30 of the current Agreement.

Rule 21 provides that: "Except as otherwise provided in these rules, eight (8) consecutive hours work, exclusive of meal period, shall constitute a day's work."

Rule 25 (f) reads: "Employes paid on a tonnage or piece work basis will be paid for actual tonnage handled each pay roll period at the specific tonnage or piece work rate, but in no case less than they would have earned each pay roll period at their hourly rate for the eight (8) or four (4) hour period."

The question is whether regularly assigned eight hour period employes who are paid on a tonnage basis are entitled to work eight hours if work is available and if required to quit work sooner should they be paid for the remainder of their tour of duty regardless of their tonnage earnings.

Rule 25 (f) is a guarantee that in any event the employes shall receive as much on a tonnage basis as they would earn in eight hours if paid on an hourly basis. If the carrier is permitted to arbitrarily reduce the number of hours of work to an extent that will only permit the employes to earn the equivalent of a day's pay, then the guaranty is meaningless. See Award 783.

Rule 30 contains the additional guarantee that a regularly assigned employe who works over four hours will be allowed a minimum of one day's pay. The exceptions stated in the rule, so far as disclosed by this record, do not affect the situation as presented in the instant claim.

The carrier argues that Rule 25 (f) "does not contemplate that the Railroad would be required to pay additional when no service was performed by the employes involved and employes were not held waiting for work. It cites Awards 1228 and 1229 which hold that the rule of the Agreements there involved does not require the carrier to work the employe eight hours if it pays for eight hours. These awards are not very helpful since neither has to do with the question of tonnage or piece work.

The construction of Rule 25 (f) urged by the carrier would require us to write into the rule the provision that in any event the employe who is

paid on a tonnage basis may not receive more than the equivalent of a day's pay. The rule is a guarantee against receiving less and not a prohibition against receiving more.

If the present situation has arisen because of "conditions beyond the control of the carrier," see Rule 30, such facts are not developed in this record. See also comment upon this phrase in Award 783.

The claim being general in its nature and not specific precludes a monetary award since only those employes who have suffered a money loss by reason of the violation of the Agreement are entitled to reimbursement. On this factual aspect of the case the carrier has a right to be heard.

The employes involved are entitled to work eight hours provided there is sufficient work. A curtailment of work to these regularly assigned eight hour tonnage paid employes for any other reason, constitutes a violation of the Agreement because Rule 25 (f) is a guarantee of "not less" and not a prohibition of "not more."

Although the carrier's action is a violation of the Agreement reparation cannot be ordered because of insufficient evidence. The matter should be remanded for development of the specific items of the claim and further negotiation between the parties in order to fix reparations.

If after such development and negotiations the services of this Board are still required the claim in its original or amended form may again be submitted to this Board.

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 has been violated and the matter should be remanded for further development and negotiations in order to fix reparations as indicated in the opinion.

AWARD

Claim sustained but remanded for further development and negotiations in order to determine reparations as indicated in the opinion and the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of September, 1941.

Dissent to Award No. 1570, Docket No. CL-1483

This Award, by arbitrary decree in the next to last paragraph of the Opinion in its statement that "The employes involved are entitled to work eight hours provided there is sufficient work.", contrary to any provision of the Agreement to such effect, represents a modification of the Agreement between the parties and is accordingly an improper decision under the law.

Basically, the Award fails to recognize common knowledge of the distinction between piece work and time payments as generally practiced on railroads where piece work payments are in effect and in other industries. Irrespective of that omitted recognition of the fundamental and practical basis of the issue here in dispute, the errors apparent in the Opinion of this Award are errors none-the-less. It does appear, however, that had recognition been given to the practical purpose of piece work payments, the misinterpretation of the cited rules of the Agreement and the deviation from the intent of its negotiators might have been avoided.

It should be sufficient to point out in succession the paragraphs of the Opinion which carry forward the mistaken holdings made manifest by the impractical declarations therein.

The fifth paragraph, citing as support an Award merely because of its use of words to the effect that "the guaranty is meaningless," which Award bore not at all upon the issue here, declares that Rule 25 (f), here necessarily involved by its specific and unambiguous guarantee of a minimum earning of **not less** than eight (8) hours' pay under the circumstances of this case, is meaningless because forsooth this instant Award contends that said Rule 25 (f) considered in the light of Rules 21 and 30 contemplates a minimum earning **in excess** of the equivalent of eight (8) hours at the hourly rate agreed upon. No comment should be needed upon such contradiction of the provisions of an agreement nor upon a statement that the possibility of limiting earnings to the minimum specified makes necessary an interpretation which extends the clear wording of the Rule and one which before the presentation of this case and according to the record had not otherwise been in effect or practiced.

The sixth paragraph refers to Rule 30 (which incidentally is a guarantee of a 6-day week) pointing out that there is in its terms also a provision for a minimum of one (1) day's pay. Rather than being any guarantee in addition to that specified in Rule 25 (f), it is a provision in harmony with the guarantee of Rule 25 (f). Recognition of the practical intent of the parties and of this harmony of Rules 25 (f) and 30 should have led to contrary decision.

That same paragraph refers to exceptions stated in Rule 30 as not affecting the situation. This is naturally true as those exceptions had nothing to do with the situation here presented,—the issue here being one specifically subject to the provisions of Rule 25 (f).

The eighth paragraph of the Opinion ignores entirely the practical situations to which piece work or tonnage bases of payments apply. The impracticality of operations which would follow any attempt to govern a working force on piece work basis so as to limit earnings of employes to the exact hourly earnings for eight (8) hours per day with its consequent holding up of the business to be handled for that purpose is one that should have barred any expression to that effect as a reason for giving expanded meaning to unmistakable wording of an agreement.

The comment in the ninth paragraph in respect to Rule 30 is inapropos to the issue. That Rule is a guarantee of a 6-day week. Such reference as it has to hours per day (which appears in the Note) gives fair evidence that the guarantee relating to the day is for minimum pay and not a requirement that hours be worked. See its provisions:

> "If worked any portion of the day and less than four (4) hours, four (4) hours shall be allowed. Over four (4) hours, a minimum of one (1) day will be allowed." Etc.

Altogether in the light of the record in this case, wisdom and propriety suggested inquiry as to the practical situation and the intent of the parties in respect to the tonnage basis situation and the intent of the parties in negotiation of Rule 25 (f) relating thereto. Most certainly could the real

meaning of that Rule have been determined through such inquiry by putting ourselves in the position of those parties when negotiating and agreeing upon it. Its clear purpose of elimination of any possibility of pay for less than the equivalent of eight (8) hours at the going hourly rate, or for less than the equivalent of four (4) hours where such minimum is otherwise provided by the Agreement, stated by the Carrier, unimpeached by the record, further supported by the implications thereof, and thus stated without ambiguity in the Rule (Rule 25 (f) itself, should have deterred from a decision which gives enlargement to that purpose and to the precise wording of the Rule agreed upon. Such enlargement of purpose and meaning of the rule had nothing of record to support it other than the assertion of claim by the employes, which in one place in the record was admitted by them to be pursued because:

> "The men want this handled as a test case as they feel they have everything to gain and nothing to lose."

This Award strains the Agreement between these parties in its expansion thereof as applying to this dispute. Its result and its consequences may be expected to be as impractical as are the unsound bases and holdings from which it derives.

S/ C. C. COOK
S/ C. P. DUGAN
S/ A. H. JONES
S/ R. H. ALLISON
S/ R. F. RAY

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 1570
DOCKET CL-1483

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes

NAME OF CARRIER: Erie Railroad Company

Upon application of the representatives of the Employes involved in the above award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3, First (m), of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The contract in question was not violated unless it can be shown there was tonnage work available for the employes when they were sent home. Employes working on a tonnage rate are entitled to be paid for such work at tonnage rates, but, in any event, such pay shall not be less than the equivalent of what they would have earned at their hourly rate for full 8-hour days during the pay roll period. If tonnage work is available for a full 8-hours a day, the employes are entitled to work 8 hours. Thus when paid the tonnage rates they may earn more in a pay roll period than the equivalent of 8 hours' pay each day on an hourly basis.

The essence of the rules in question is a guarantee of a minimum of 8 hours' pay per day during the pay roll period, provided work is available. When tonnage work is not longer available, there is no violation of the agreement, provided the employes receive such minimum pay for the pay roll period. In the light of this interpretation the answers to the 3 questions propounded in the Brotherhood letter of November 28, 1941, must be No.

Referee George E. Bushnell, who sat with the Division, as a member, when Award 1570 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 1st day of April, 1942.