Award No. 2140
Docket No. CL-2147

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

THE NEW YORK CENTRAL RAILROAD

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

STATEMENT OF CLAIM: Refusal of the committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, to longer recognize the right of the carrier, under the agreement of April 1, 1930, to assign men only to certain positions in the Car Service Department, Buffalo, New York.

CARRIER'S STATEMENT OF FACTS: This dispute arises because of the fact that the Clerks' organization now disagrees with an understanding which was had prior to April 1, 1930, specifically referring to Section 8 of an unsigned agreement, reading as follows:

> "Female employes will be permitted to hold positions in the Assorting Department, Record Department, Per Diem and Mileage Department, filing work, stenographic, Comptometer and other types of calculating or typewriting machine work, but will not be permitted to hold positions other than those classified above in the Tracing and Homeroute Department, Correction and Time Movement Department, Reclaim Department, Bookkeeping and Payroll Department."

It is now contended by the organization that no such understanding was ever had.

POSITION OF CARRIER: The management will hereinafter prove through the introduction of certain exhibits that, not only Section 8, referred to and quoted in the Statement of Facts, was agreed to as an unsigned agreement, but that all Sections of said agreement were agreed to, and carried out during the intervening years in accordance with their specific terms, said Sections being 1 to 9 inclusive.

The management's arguments are based upon the following principal points:

1. AN AGREEMENT WAS MADE WITH THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS TO BE EFFECTIVE APRIL 1, 1930, AND, WHILE UNSIGNED, WAS NEVERTHELESS AN AGREEMENT.
2. SECTION 8 OF SAID AGREEMENT PROVIDED THAT FEMALE EMPLOYES WOULD NOT BE PERMITTED TO HOLD POSITIONS IN CERTAIN DESIGNATED SUB-DEPARTMENTS.
3. SAID AGREEMENT WAS PUT INTO EFFECT AND HAD BEEN CONTINUED IN EFFECT EVER SINCE APRIL 1, 1930.

then Vice President-Personnel, presided over and out of which memoranda effective February 16, 1937, covering the Car Service Office, were negotiated and adopted. At that time Mr. Walber admitted that the proposal did not constitute an agreement and dismissed it as having no significance or effect.

It is our position that there is nothing in written or oral form between the parties which specifies or implies, in any manner whatsoever, that female employes may be denied assignments to any position in the Car Service Office because of their sex; nor is there anything in written or oral form between the parties which specifies or implies, in any manner whatsoever, that certain positions in the Car Service Office shall be assigned to male employes exclusively.

Employes' Exhibit "A" places in evidence pertinent rules of our Agreement effective September 1, 1922, revised April 1, 1923; also, Memoranda effective February 16, 1937 applicable to the Car Service Office.

The provisions of our Rules Agreement and the Memoranda negotiated for the Car Service Office are clear and they contain no restrictive or preferential provisions with respect to employes, either male or female. Rule 4 of the Rules Agreement expressly and definitely establishes the basis to govern assignments of all employes to bulletined positions. This is further confirmed by the fact that in the Memorandum of Understanding, effective February 16, 1937, Section 2 unequivocally states "The rules of the clerks' agreement shall govern all changes in forces."

OPINION OF BOARD: This dispute is submitted to this Board by the Carrier which seeks to have enforced the terms of an alleged oral agreement claimed to have been entered into April 1, 1930. This proposal which would have amended the agreement, which became effective September 1, 1922, was submitted by the Carrier to the representatives of the employes. Rule 8 of this memorandum reads as follows:

> "Female employes will be permitted to hold positions in the Assorting Department, Record Department, Per Diem and Mileage Department, filing work, stenographic, Comptometer and other types of calculating or typewriting machine work, but will not be permitted to hold positions other than those classfied above in the Tracing and Homeroute Department, Correction and Time Movement Department, Reclaim Department, Bookkeeping and Payroll Department."

This proposed agreement was never signed; but the Carrier claims that it was agreed to orally and was put into effect and has been carried out for a period of twelve years. The employes categorically deny that it was ever assented to.

The present submission by the Carrier grows out of a claim submitted by the Committee on behalf of certain women employes who its is alleged were refused assignments as senior bidders to certain positions which had been bulletined. By such action they claim that there was a violation of Rules 4, 7 and 9 which relate to seniority. The Carrier justifies its refusal to award the positions to the applicants on the ground that, being women, they were barred by the provisions of Rule 8 of the proposed oral agreement. The specific claim of the women, which is also before the Board, Docket CL-2159, has been argued in connection with this dispute, and will obviously be disposed of by the decision here rendered.

There unquestionably was discussion between the parties during conferences in 1930 relative to the exclusion of women from work in certain departments, and in consequence it seems that women were transferred from these departments to others. Positions in these departments have apparently been filled since by men. This change was instituted as part of a reorganization which consolidated in Buffalo the Car Service Offices of the New York

Central System. Certain salary increases were made amounting to approximately $40,000 per year. The Carrier also desired to except certain positions from the then effective agreement but the representatives of the employes objected. At a conference in New York in the latter part of March the Carrier's draft of the amendment to the agreement was presented to the representatives of the employes. The Carrier asserts that this was discussed but it is apparent that the representatives of the employes were unwilling to sign. The Carrier asserts, however, that the principles of the proposal were put into effect as a "Gentlemen's Agreement." There is considerable evidence in the record to support the Carrier's recital as to what took place. The parties are, however, in absolute disagreement as to what was intended to be the effect of all these negotiations or of the understanding which may have been reached at the conferences. The Carrier argues that the increases in pay were the consideration received by the employes for their assent to the changes in the rules which the so-called agreement clearly called for. We do not think that this contention can be sustained. The increases were not general to all employes covered by the effective agreement and were given primarily, according to the Carrier's own statement, to raise the salaries of the New York organization to the level of those paid on other lines of the New York Central System.

We do not mean to decide that there cannot be a modification of an agreement by parole. But we do wish to call attention to what it seems to us is an essential principle,—that, if there is to be any such modification, the terms of the oral agreement should be established by clear and convincing proof and that it should be apparent that it was not intended by the parties to be just a vague expression of an understanding to be carried out so long as the parties might find it convenient to do so. In so far as the present so-called agreement is concerned, it seems to us particularly important that there should be no doubt about its terms or their effect. It modified in very essential particulars some of the most important rules of the agreement, —those relating to seniority. And these rights should not be taken from employes unless it appears that such was the clear intent.

We think that the evidence in this case construed most favorably for the Carrier indicates that this so-called arrangement or understanding was never intended by both parties as an enforcible agreement. The construction which the Carrier itself has put on it indicates that it was not so intended. Why was it not signed? It seems to us most probable that the representatives of the employes were unwilling to enter into a binding agreement which changed so drastically the terms of the rules under which they were then operating. We can surmise that the union representatives were particularly loath to give formal assent to a contract which discriminated as between men and women in work which women had been doing and which they felt capable of continuing to perform. If anything came out of the negotiations, it was nothing more than a tacit understanding that in view of the difficulties which the Carrier was having, particularly with the onset of a depression, the representatives of the employes would try to persuade employes to assent to the changes in practice which the Carrier desires without formally giving up their legal right to object. We think that this is the Carrier's own construction of the negotiations. For in its submission it refers to it as a "Gentlemen's Agreement." It says specifically "said agreement was adopted as a 'Gentlemen's Agreement'." Mr. Jackson, Assistant Superintendent of Car Service, who carried on the negotiations for the Carrier, construes it as a "Gentlemen's Agreement."

What therefore is a "Gentlemen's Agreement"?

We hold that it is an agreement which the parties express an intention to carry out but which both recognize is not legally enforcible. Webster's New International Dictionary (2 ed.) defines it as follows: "An informal substitute for an agreement, secured only by the honor of the participants."

And then the text cites as an example the diplomatic agreement made in 1907, not embodied in law or treaty, between this country and Japan regarding restriction of Japanese immigration—an arrangement recognized by both governments as legally unenforcible, and intended to be of that character in order not to give offense to Japan.

We feel with respect to the case now before us that both these parties, and particularly the representatives of the employes, treated the understanding which they reached as of just that character and it was understood that the arrangement tacitly agreed to was to remain effective only so long as the parties saw fit to abide by it.

In a situation which has at least some analogy to this and involving this same Carrier, this Board refused to enforce an understanding with respect to a raise in wages because it was clear that the understanding was not intended as a binding agreement but only an expression of a willingness to renegotiate the schedule of pay. Award 1812.

Even though the terms of the understanding now before us may have been acquiesced in over a long period of time, there is no general estoppel against the enforcement at least prospectively of the formal agreement effective in 1922 for the very good reason that the parties impliedly by this so-called "Gentlemen's Agreement," understood that effect could legally be given to the original agreement at any time.

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 Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers and Station Employes was justified in its refusal to recognize the right of the Carrier under the so-called "Gentlemen's Agreement" to assign men only to certain positions in the Car Service Department at Buffalo.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, this 5th day of April, 1943.