Award No. 2273
Docket No. CL-2380

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

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

GULF COAST LINES, INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY, SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY, SUGARLAND RAILWAY COMPANY, ASHERTON & GULF RAILWAY COMPANY

(Guy A. Thompson, Trustee)

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

(a) The Carrier violated the Clerks' Agreement on January 20, 1943, when it denied Mrs. Pauline B. Cobb the right to work overtime in the performance of work regularly assigned to and performed by her. Also

(b) Claim that Mrs. Cobb be paid four (4) hours overtime because of the agreement violation.

EMPLOYES' STATEMENT OF FACTS: Mrs. Cobb is employed as Comptometer Operator in the Auditor's Office at Houston.

On January 20, 1943, certain work in the Auditor's office had to be completed which required overtime work. Five hours overtime was required in the performance of the comptometer work regularly assigned to Mrs. Cobb.

Mrs. Cobb worked one hours' overtime on January 20, 1943, but was not permitted to perform the remainder of her work. The balance of the comptometer work (four hours) was performed by T. G. Ferguson, who is regularly assigned to the position of payroll clerk in another department.

POSITION OF EMPLOYES: The employes quote paragraph (b) of Rule 45 in support of this claim:

> "In working overtime before or after assigned hours, employes regularly assigned to class of work for which overtime is necessary shall be given preference; the same principle shall apply in working evtra time on Sundays and holidays."

The above rule is very plain and the Carrier thoroughly understands its meaning and application. Your Honorable Board has had this rule before it on several occasions and Awards Nos. 1630, 1631 and 2101 involved this same agreement. Awards Nos. 420, 572, 2043 and 2044 involved similar rules, although different agreements.

lation in conflict therewith the Texas Act is applicable. The Attorney General then cites a number of authorities after which he makes the following statement on page 5:—(see Carrier's Exhibit No. 1)

> "The regulation of hours of service of labor of women employes is clearly within the police power of the State of Texas. We find nothing in the provisions of either the Hours of Service Act or the Railway Labor Act tending to impair the validity of the Texas Women's Labor Law as it may effect the employment of women engaged in the types of work mentioned. 'The intention of Congress to exclude states from exerting their police power must be clearly manifested.' Reid v. Colorado, 187 U. S. 137, 148, 23 S. Ct. 92, 47 L. Ed. 108; Savage v. Jones, 225 U. S. 501, 533, 32 S. Ct. 715, 56 L. Ed. 1182."

Following the above quoted statement, the opinion of the Attorney General's Department, personally approved by the Attorney General, is rendered, which is that the Federal Railway Labor Act does not impair the validity of the Texas Women's Labor Law, that same is valid and enforcible insofar as it may effect the hours of service of women employed by railroads engaged in doing business in interstate commerce with the exception of those women, who, in isolated instances may be "actually engaged in or connected with the movement of any train," and that women employed in offices performing the types of work mentioned in paragraph 1 of the Attorney General's opinion, are not within the exception.

By referring to the Local Chairman's letter to the Auditor dated February 13, 1943 and the General Chairman's letter to the Assistant General Manager dated February 17, 1943, both of which are quoted in the Carrier's Statement of Facts, it will be found that the claim is based upon Paragraph B of Rule 45 of the Current Agreement with the Clerks' Organization, which reads as follows:

> "In working overtime before or after assigned hours, employes regularly assigned to class of work for which overtime is necessary shall be given preference; the same principle shall apply in working extra time on Sundays and holidays."

Under the above quoted rule Mrs. Cobb was permitted to work one hour overtime on January 20, 1943 and at 6:00 P. M. on that date, having worked *nine hours, was relieved of further service by reason of the fact that the Carrier* is prohibited under the Texas State Law to require her to work in excess of nine hours on any calendar day, which law is applicable to women employes according to the opinion rendered by the Attorney General's office of the State of Texas approved by him personally, October 2, 1942. (See Carrier's Exhibit No. 1.)

In the instant case, Mrs. Cobb was given preference to work overtime after her assigned hours as is provided for in Section B, Article 45 of the current Agreement with the Clerks' Organization and worked the full amount of overtime which the Carrier could permit her to work and comply with the Texas State Law governing the hours of service of female employes.

There is no law, either Federal or State, which limits the hours of service of male employes engaged in clerical work such as involved in the instant case and, therefore, in order to assure the closing of the accounts in the Auditor's office on January 21, 1943, Mr. T. G. Ferguson was called to perform the comptometer work on an overtime basis as the Carrier could not legally permit Mrs. Cobb to work in excess of nine hours on that date.

Based on the facts and evidence herein submitted, Carrier respectfully requests your Honorable Board to deny the claim of the employes.

OPINION OF BOARD: This docket presents the claim of Mrs. Pauline B. Cobb for four hours' overtime which it is alleged she was entitled to

work under the Agreement. The Carrier assigned the work to another employe, contending that it could not legally give the work to the claimant because of a Texas Statute prohibiting women from being worked more than nine hours in any 24-hour period.

The Carrier in support of its position cites an Opinion of the Texas Attorney General to the effect that the Texas Statute was applicable and not abrogated by any Federal Act.

It is admitted that Congress has the power to fix the hours of persons engaged in interstate commerce but the Carrier questions whether that power has been exercised by Congress in such a manner as to prelude the State from acting in that field. It is admitted that the State may legally act within its police power and fix hours of work for women if Congress has not acted in such a manner as to preclude action by the State.

The Federal "Hours of Service" Act, approved March 4, 1907, limited the hours of service of employes "actually engaged in or connected with the movement of any train." In Erie R. R. Co. v New York, 233 U. S. 671, it was held that where Congress has acted in that manner, "It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it." It is admitted that the claimant here, however, was not one of the class of employes covered by the "Hours of Service" Act.

The employes contend that the Railway Labor Act has taken all employes of interstate carriers out of State control as to "working conditions," which term, the employes insist, covers the hours of employment.

The Railway Labor Act does cover the employe here in question. It covers "every person in the service of a carrier * * * who performs any work defined as that of an employe or subordinate official in the orders of the Interstate Commerce Commission * * *." The Act does not expressly fix the hours of work of such employes but does set up a method and general plan for the Carriers to and their employes to agree upon and fix rates of pay and working conditions.

In Long Island R. R. Co. Dept. of Labor, 256 N. Y. 498, the Court of Appeals of New York had before it the validity of a state statute purporting to fix wages of employes in conflict with wages as set up by an agreement made pursuant to the Railway Labor Act. The Court held the State Act was invalid, saying: "Its (The Railway Labor Acts') purpose of ending labor disputes may be thwarted by any regulation of the State compelling payment of wages to 'employes' at a different rate. It seems to us clear that Congress intended to exclude any interference by any State in the field of wages of employes of interstate carriers. The Labor Law of this State may for these reasons not be applied to any 'employe' as defined in the Federal Act * * *." If this be true as to wages, it seems to us that the same reasons apply as to hours. The agreement entered into under the provisions of the Railway Labor Act, which fixes wages must also fix the hours. We do not see how the agreement can fix the rate of pay without fixing the hours of work.

We are therefore constrained to hold that the Texas Statute here in question may not be applied to the claimant who was an employe of the Carrier.

The Attorneys General of Ohio, Oregon and Pennsylvania have each given opinions that Statutes of their respective States regulating the hours of work for women did not apply to women employes of interstate Carriers.

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 Employe involved in this dispute are respectively Carrier and Employe 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 Carrier violated the Agreement.

AWARD

The Claim, (a) and (b), is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson,
Secretary

Dated at Chicago, Illinois, this 10th day of August, 1943.

DISSENT TO AWARD 2273, DOCKET CL-2380

We dissent to the reasons advanced for sustaining this claim and particularly to the conclusion that the Texas statute regulating the hours of work of women is in conflict with the Railway Labor Act.

The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect to the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action, and ordinarily an intention exclusively to regulate will not be implied unless, fairly interpreted, the federal measure is plainly inconsistent with state regulation of the same matter. (Gilvary v. Cuyahoga Valley Railroad Co., 292 U. S. 57, 60.)

There is no specific provision in the Railway Labor Act authorizing the inclusion of provisions in agreements, between carriers and their employes, which violates state statutes regulating the hours of labor of female employes such as those here involved. We are not aware of any decision of a court of last resort holding that such authority may be fairly implied. Until a court of last resort shall have held that the Railway Labor Act authorizes the inclusion (or enforcement) of such provisions in agreements between carriers and their employes, or that a state statute such as the one in question is in direct conflict with the Railway Labor Act, it is our opinion that this Division is not justified in so holding.

/s/ A. H. Jones
/s/ R. H. Allison
/s/ C. C. Cook
/s/ R. F. Ray
/s/ C. P. Dugan