Award No. 3863

Docket No. CL-3867

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

James M. Douglas, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY SOUTHERN RAILWAY COMPANY

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

(a) The Carrier violated and continues to violate the Memorandum of Agreement effective October 1, 1944, by failing and refusing to apply the provisions of said Memorandum of Agreement.

(b) All employes adversely affected by such violation shall be compensated in accordance with said Memorandum of Agreement retroactive to January 1, 1947.

JOINT STATEMENT OF FACTS: The parties to this dispute entered into a Memorandum of Agreement effective October 1, 1944 covering rates of pay for Sundays and Holidays of all employes on seven day assignments. Copy of said Memorandum of Agreement (marked exhibit A) attached and made a part of this claim.

On December 31, 1946 the carrier issued circular to all of its various departments advising that said Memorandum of Agreement had expired as of that date due to Proclamation of The President of December 31, 1946. Copy of said Circular attached marked Exhibit (B). Copy of Proclamation of The President attached marked Exhibit (C). STATEMENT BY THE PRESIDENT dated December 31, 1946 attached marked Exhibit (D).

On January 10th, 1947 General Chairman, J. L. Webster telephoned Mr. J. M. Prickett, Vice President, protesting his circular.

On January 14, 1947, Mr. Prickett wrote General Chairman Webster referring to telephone protest and advised that General Counsel Brown had informed him (Prickett) that he was correct in action taken. Copy letter attached marked Exhibit (E).

On February 8, 1947 General Chairman Webster wrote Vice President Prickett insisting that the carrier cancel their circular of December 31, 1946 and that all employes be paid time and one-half time for all Sunday and holiday work performed. Copy letter attached marked Exhibit (F).

On February 27, 1947 Vice President Prickett wrote General Chairman Webster advising that he would not cancel his circular of December 31, 1946. Copy letter attached marked Exhibit (G).

A condition, or state, had been created by the conflict, which made it necessary to retain war powers. He in fact said "altho a state of war still exists, I declare the war has terminated."

The Agreement, eliminating the reference to Victory Day, provided that Modified Rule 41 should continue in force only until the President proclaimed the war had terminated. A state or condition of war may exist, altho a war has terminated. Had the parties intended Modified Rule 41 should remain in force until treaties had been signed and the President proclaimed the "State of War" had terminated, the contract would have so provided. Instead it provided said Modified Rule 41 would continue only until war, or hostilities, terminated. The war, or hostilities, ended when Japan surrendered. Modified Rule 41, parties agreed, could be discontinued when the President proclaimed the war or hostilities terminated. This proclamation, as heretofore stated, was issued December 31, 1946.

It is submitted that the Kansas City Southern Railway Company acted under the agreement, and modified Rule 41 was terminated on said December 31, 1946.

In addition to the above, attention is invited to the following excerpts from the Carrier's letters to the Organization.

> "I think you will agree we both understood the special agreements were to be effective 'for the duration,' and in defining the time we both had in mind it would not last beyond the date of the President's proclamation terminating the emergency measures that were made necessary by the existence of hostilities." (See Exhibit "E")

> "I think you and I know what we had in mind when we made the agreement of September 18, 1944, and I think we all knew what we meant by 'V-Day' as it was generally understood at that time. In order to have a specified date set for the termination of this agreement and not simply to rely upon newspaper or radio accounts, we specified that it should be the date designated or proclaimed by the President of the United States or other Governmental authority duly empowered as the date of the termination of the war. President Truman in his proclamation of December 31, 1946 states clearly that this Nation and our Allies 'wrung final and unconditional surrender from our enemies,' and that hostilities have terminated. He goes on to say that 'great gains have been made in translating military victory into permanent peace.' It is regrettable that an understanding such as we entered into should now be the subject of a dispute based upon a technicality involving the use of one or two words, when I am sure you and I knew what we both had in mind when we signed it up." (See Exhibit "G")
> (Exhibits not reproduced.)

OPINION OF BOARD: On September 18, 1944 while our country was engaged in fighting a war on two fronts, the Carrier and the Brotherhood entered into a supplemental agreement modifying Rule 41 "Sunday and Holiday Work" rule which states:

> "Work performed on Sundays and the following legal holidays: namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided that when any of the above holidays fall on Sunday, the day observed by the State, Nation or by Proclamation shall be considered the holiday) shall be paid for at the rate of time and one-half, except that employees on regular seven (7) day assignments and those who relieve them shall be compensated on the same basis as on week days."

The modification consisted of eliminating from the rule the last part "except that employes on regular seven (7) day assignments and those who relieve them shall be compensated on the same basis as on week days."

It is Carrier's position, which is not disputed, that it would be unable to fill the seven-day jobs on the seventh day and on holidays by relief men because of the war emergency and resulting shortage of men, and it wanted to avoid any obligation to provide relief men for the duration.

The supplemental agreement contained the following clause with reference to its expiration:

> "3. The parties hereto agree that said Rule 41, changed and modified as set forth in Section 2 of this Agreement, shall continue in effect until such date as shall be designated or proclaimed by the President of the United States, or other Governmental authority duly empowered, to have been the date (hereinafter for convenience called 'V-Day') on which the war with Germany and the war with Japan (whichever is the later date) terminated."

The question for decision turns on what the parties meant by the above paragraph.

The Brotherhood contends in effect that the termination date is fixed as the date the termination of the "state of war" with the two countries is officially proclaimed, and since this has not yet been done the agreement is still in effect.

Carrier contends the agreement expired on the announcement of V-J Day by the President; or at least on December 31, 1946 when the President issued a "Proclamation of Cessation of Hostilities." Carrier gave notice to the Brotherhood declaring the agreement terminated as of December 31, 1946.

The President's proclamation of that date stated that although a state of war still exists, hostilities have terminated. The Supreme Court of the United States has recently pointed out in the case of Woods, Housing Expeditor etc. v. Miller Co. etc. that such proclamation "inaugurated 'peace in fact' though it did not mark termination of the war."

It is true that in a legal sense a state of war still exists both with Germany and with Japan. "Ordinarily, the existence of war, in a legal sense, continues until the exchange of peace treaties or the ratification of a peace treaty." "56 American Jurisprudence, p. 142. We also find in 67 Corpus Juris, 429 ". . . the mere cessation of actual hostilities does not terminate the war in the legal sense, until followed by formal proclamation or declaration of peace."

The agreement fixes the date of expiration as the date on which war is terminated, not on the date on which peace is officially and finally proclaimed. The common understanding seems to be that war is terminated when fighting stops. On the occasion of the signing of the Armistice in World War I the President declared to Congress: "The war thus comes to an end." Yet in the legal sense the state of war had not then ended because peace had not yet been proclaimed. Had the parties here had in mind the termination of war in the legal sense, they would have fixed the date of expiration as that on which the "proclamation of the treaty of peace" would be made.

So we do not believe that the agreement intended the official termination of the war in the legal sense as the date of its expiration. Furthermore, it uses the term "designate" along with proclaim. The President does not "designate" the date of the making of a treaty of peace but he may "designate" "Victory Day" or "V-Day," and the latter term is used.

In a footnote in the case of Hamilton v. Kentucky Distilleries Co. in the Supreme Court of the United States, 251 U. S. at page 165, are found a number of provisions fixing the date of expiration of various war enactments in World War I. They refer to the termination of the state of war in its legal sense as the date on which "the proclamation of the treaty of peace" is made; "termination of the war by the proclamation of the treaty of peace"; "final treaty of peace is proclaimed"; "proclamation of the final

treaty of peace"; "proclamation by the President of the exchange of ratifications of the treaty of peace"; and so on.

Since the agreement does not refer to a proclamation of a treaty of peace we believe it did not intend to fix the date of the termination of war in its legal sense as the date of its expiration.

Accordingly, the claim must be denied.

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 Carrier did not violate the agreement as modified.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 19th day of April, 1948.