Award No. 4048
Docket No. CL-3980

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Scope of the Rules Agreement, effective May 1, 1942, during the months of May, June, July, and August 1945, Stores Department, Toledo, Ohio, by assigning employes with no seniority rights to perform stores department work.

(b) L. E. Rogers, Truck Driver, and H. G. Wandtke, Store Attendant, should be paid at the rate of time and one-half for time that they were available during this period, to perform this work. (Docket W-419)

EMPLOYES' STATEMENT OF FACTS: There is in effect a Rules Agreement, effective May 1, 1942, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e) of the Railway Labor Act. This Rules Agreement will be considered as a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The claimants are employed as a truck driver and store attendant, respectively, at the Stores Department, Toledo, Ohio. These positions are included in the Scope of the Rules Agreement referred to above, under Group 2. The claimants have seniority on the division seniority roster for the Toledo Division of Clerical, Other Office, Station and Storehouse Employes in Group 2.

Immediately prior to May 16, 1945, extra work in the Stores Department was performed by utilizing the services of the regular Stores Department employes on an overtime basis.

Because of this extra work, the Carrier advertised six new laborers' positions on bulletins issued May 2, June 13, July 18, August 22 and October 3, 1945, for which no bids or applications were received. During this period the Carrier neither hired new employes that could be assigned to such vacancies in accordance with Rule 2-A-1(d) nor did it make any assignment to these vacancies.

The dates for which claim is made for each of the Claimants, the additional hours claimed by them and the time worked by the Mexican Nationals is shown below, and made a part of these facts:—

employes within the Scope of the Agreement; and that the temporary status of their employment, which would preclude their entitlement to seniority under the applicable agreement of the craft or class in which employed, would not debar the Carrier's utilization of their services, in classifications approved by the War Manpower Commission, when the need for their services arose.

Therefore, the Carrier respectfully submits that under the circumstances herein set forth the use of Mexican Nationals on positions of Stores Laborer in its Stores Department at Toledo was proper and did not constitute a violation of the Scope rule or any other rule of the applicable Agreement. On the contrary, the assignment of such workers was done in accordance with the provisions of Rule 2-A-1 of the applicable Agreement.

III. Under the Railway Labor Act, the National Railroad Adjustment Board, Third Division, is Required to Give Effect to the Said Agreement Between the Parties and to Decide the Present Dispute in Accordance Therewith.

It is respectfully submitted that the National Railroad Adjustment Board, Third Division, is required by the Railway Labor Act to give effect to the said Agreement, and to decide the present dispute in accordance therewith.

The Railway Labor Act, in Section 3, First, subsection (i), confers upon the National Railroad Adjustment Board, the power to hear and determine disputes growing out of "grievances or out of the interpretations or application of agreements concerning rates of pay, rules or working conditions." The National Railway Adjustment Board is empowered only to decide the said dispute in accordance with the Agreement between the parties to it. To grant the claim of the Employes in this case would require the Board to disregard the Agreement between the parties thereto and impose upon the Carrier conditions of employment, and obligations with reference thereto, not agreed upon by the parties to this dispute. The Board has no jurisdiction or authority to take such action.

CONCLUSION

The Carrier has shown that under the circumstances herein the use of the Mexican Nationals as Stores Laborers at Toledo Shop was proper and in accordance with the provisions of the applicable Agreement, and that such use of the Mexican Nationals did not constitute a violation of the applicable Agreement.

It is, therefore, respectfully submitted that the claim is not supported by the applicable Agreement and should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: This claim grows out of the employment and use, by the Carrier, of Mexican Nationals, during the emergency created by the late war. These Mexican Nationals were never, at any time, covered by, or obtained any rights under, the Clerks' Agreement, and but for the special circumstances and arrangements, hereinafter referred to, would not, under such Agreement, have been permitted to perform any of the work covered by the Scope Rule thereof.

As is known, a state of war existed in this country beginning in December, 1941. It created a labor shortage throughout the entire country, which affected all types of industry, and seriously limited war efforts. In this situation, and on April 29, 1943, the Governments of the United States and Mexico entered into, what is called in this docket, an Agreement, under which non-agricultural Mexican Nationals were permitted to migrate, temporarily, to the United States for the purpose of relieving the labor shortage aforesaid. Subsequently, there was an agreement between the War Manpower Commission, an agency of the United States Government, and petitioner herein, evidenced by two letters, one signed by petitioner's Grand President to an official of the War Manpower Commission, dated March 14, 1944, and the reply thereto, dated March 20, 1944. The importance of these communications justifies their incorporation in this opinion. The first letter reads:

Cincinnati, Ohio
March 14, 1944.

Mr. Robt. L. Clark
Acting Chief
Employment Office Service Division
Bureau of Placement
War Manpower Commission
Washington, D. C.

Dear Mr. Clark:

To avoid any difficulties in the future respecting employment of Mexican Nationals by the railroads as stores department, tie plant and icing plant laborers, and freight handlers, when domestic workers cannot be recruited, please be advised that under these circumstances we, as a general policy, do not object to their employment.

However, to avoid unnecessary local difficulties from arising, we think it would be well if railroad management officials were required to consult with the representative of the craft or class of employment in which their services are to be engaged, prior to their employment. Such prior consultation to be for the purpose, if possible, of reaching an understanding regarding—

(a) Inability to obtain needed domestic workers;

(b) Character and location of employment; and

(c) The maximum number to be employed at each specific point on the railroad.

If this suggestion appeals to you, we will be pleased to cooperate in carrying out this or some similar arrangement.

Sincerely yours,

(signed) Geo. M. Harrison,
Grand President.

The second letter, the reply to the first, reads as follows:

March 20, 1944

Mr. George M. Harrison
Grand President
Brotherhood of Railway and Steamship Clerks
Brotherhood of Railway Clerks Building
Cincinnati 2, Ohio

Dear Mr. Harrison:

This refers to your letter of March 14, 1944, file 484-6, in which you suggested that railroad management officials consult with representatives of the crafts or classes of employment in which the railroads wish to employ Mexican Nationals.

In the past the railroads have furnished up with the name of the union or organization for each Interstate Commerce Commission Occupational Classification or group of ICC Occupational Classifications for which Mexican Nationals are requested and the result of their consultation with the appropriate representative of each union involved and it is our plan to continue this practice.

We are enclosing a list of our proposed allocations of the additional Mexican Nationals which will bring the total of such workers in the United States to 40,000 and also the names of other railroads presently employing Mexicans. It is suggested that you inform your General Chairman of all roads now using or intending to use Mexican Nationals, and if there is any objection to the employment

by these railroads of Mexican Nationals in any occupations within the jurisdiction of your organization, that efforts be made to resolve such problems with the railroads, and if not resolved, that your objections be transmitted to the War Manpower Commission.

In the future you will be advised of other railroads which desire to employ Mexican Nationals.

Very truly yours,

(Signed) ROBERT L. CLARK
Acting Chief, Employment
Office Service Division,
Bureau of Placement.

It is important, we think, to note two facts appearing on the face of these letters: The first is that the Grand President does not demand or insist that representatives of the crafts or classes which might be affected by the employment of Mexican Nationals be consulted, but merely states his belief that it would be well to do so, and suggests certain matters which should be considered. The second is that, in the reply to the Grand President's letter, it is stated that a list was enclosed therewith showing the proposed allocation of additional Mexican Nationals being brought into this country, and the names of railroads proposing to employ them; and the suggestion is then made that the Grand President inform his General Chairman, on all roads using or intending to use Mexican Nationals, of what was proposed to be done, or what had been done, and that if any objections to their use developed, an effort be made to resolve the problem with the railroads, and, if not so resolved, that such objections be transmitted to the War Manpower Commission, and that in the future the Grand President would be advised of other railroads which desired to employ Mexican Nationals. The docket does not disclose further correspondence between these parties; nor does it disclose the list of railroads then employing or proposing to employ Mexican Nationals; and therefore, we cannot state whether the Carrier here involved was included in the list then furnished. Furthermore, until this claim was first set in motion, there is no showing in the docket that there was objection on the part of the petitioner to the employment of such Nationals by the Carrier, in positions covered by the Clerks' Agreement, at any point on its lines. It is true that the docket shows that in certain instances, in certain seniority districts, officials of petitioner were consulted by the Carrier in respect to the employment of Mexican Nationals; but it is by no means clear whether this consultation was in conformity with some requirement, or merely followed the suggestion of the Grand President, in his letter of March 14, 1944. It should be here stated that at no time was there any agreement between the petitioner and the Carrier, in respect to the employment of Mexican Nationals. Apparently, the Carrier relied on the understanding between petitioner and the War Manpower Commission. And, further, there is no showing or attempted showing of any negotiations or agreement between the Carrier and petitioner, in respect to employing Mexican Nationals in the Stores Department of the Carrier, located at Toledo, Ohio.

In the spring of 1945, a shortage of labor developed in the Stores Department of the Carrier at Toledo, Ohio. The claimants hercin were employes in that department, and covered by the Clerks' Agreement. Due to the labor shortage aforesaid, they were being called from time to time to do overtime work. In this situation, the Carrier, on May 2, 1945, bulletined six positions in the Stores Department, and received no bids therefor. Like bulletins were posed on June 13, July 18, August 22, and October 3, 1945, with the same result. On May 16, 1945, and after the first of the bulletins was posted, the Carrier employed three Mexican Nationals in its Stores Department at Toledo, probably recruiting them from its Mechanical Department at the same location, and they worked during the months of May, June, July and August, 1945, and did some, if not all, of the work which the claimants had theretofor performed on an overtime basis, thus, in effect, curtailing the overtime work which the claimants had customarily performed. Claimants were at no time deprived of any work on their regular assignments.

The Carrier seeks to justify its action by referring to the Agreement between the two governments, aforesaid, the general agreement between the petitioner and the War Manpower Commission, and an order of the War Manpower Commission, dated January 8, 1944, and which reads as follows:

> "It is further ordered that the Mexican Laborers whose temporary admission is authorized hereunder may be employed, as the need arises and in such numbers as are deemed necessary, in all classifications of 'Laborers', 'Helpers', 'Assistant Foremen', and semi-skilled 'Machine Operators' in those Interstate Commerce Commission Groups designated as Maintenance of Equipment and Stores, Maintenance of Way and Structures, and Transportation."

The claim here filed is that in employing these Mexican Nationals, the Carrier violated the scope of the Rules Agreement, under which the claimants worked and held seniority; and that the claimants should be paid at the rate of time and one-half for the time they were available, during the period covered by the claim, to perform the work which the said Mexican Nationals actually performed during that period.

In our opinion, the claim should be denied. It is true, of course, that the Nationals so employed had no rights, seniority or otherwise, under the Clerks' Agreement, or, for that matter, under any other Agreement in which the Carrier and any Labor Organization were parties, and, therefore, whether they were recruited for work from the Carrier's Mechanical Department, or had never performed any work for the Carrier, is not material. Whatever right or privilege they had to perform work, or whatever right the Carrier had to employ them, arise out of the war emergency then existing, and the agreements and understandings to which we have above referred. But for this situation, and the agreements aforesaid, these Nationals would, under the Clerks' Agreement, had no right to work, and the claim should be sustained. We think, however, that the agreements aforesaid, and the order of the War Manpower Commission of January 8, 1944, justify the Carrier's action, and that in so acting it did not violate the Scope Rule, or any other rule of the Clerks' Agreement.

We do not understand that the petitioner seeks to evade or avoid the force and effect of the general agreements, understandings and orders, outside of the Clerks' Agreement, which we hold justified the Carrier's action. Its position, as we understand it, is that there was no local application of said agreements, understandings, and orders, and that a local agreement was necessary as a prerequisite to the employment of Mexican Nationals in the local district, and on this contention it bases its claim.

We are not persuaded, for reasons stated above, that any such local agreement was necessary. True, such agreements were suggested, but, in our opinion, they were not imperatively necessary. The Carrier made every reasonable effort to recruit a force to meet its needs for labor, before Mexican Nationals were employed, and we do not think it was required to go further, especially when what it did in no wise deprived any employe, working under the Clerks' Agreement, of any work of his regular assignment, but merely avoided the need of calling him for overtime work.

Holding these views, 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 there was no violation of the Clerks' Agreement.

AWARD

Claims (a) and (b) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 10th day of August, 1948.