Award No. 4133
Docket No. CL-4015

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

FORT WORTH AND DENVER CITY RAILWAY COMPANY

THE WICHITA VALLEY RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes that:

(a) The Carrier is violating the Clerks' Agreement in the Store Department at Fort Worth, Texas by using an extra laborer to relieve only five regularly assigned laborers one day each week. Also

(b) Claim that each of the five regularly assigned laborers be paid eight (8) hours at the rate of time and one-half for each day they have been relieved in violation of the agreement, retroactive to June 27, 1946.

EMPLOYES' STATEMENT OF FACTS: On April 1, 1946 the following rule became effective on this property:

> "Rule 48.—Sunday and Holiday Work.—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 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 at the rate of time and one-half, except that employes necessary to the continuous operation of the Carrier and who are regularly assigned to such service will be assigned one regular day off duty in seven, Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half time; when such assigned day off duty is not Sunday, work on Sunday will be paid at straight time rate."

On the same date the following Lateral Agreement became effective:

> "Mediation Agreement in Case No. A-1981 by and between Fort Worth and Denver City Railway Company and The Wichita Valley Railway Company on the one hand, and Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, for the Employes, on the other hand, was consummated today. The said Mediation Agreement includes revision of Rule 48 of current labor agreement covering Sunday and holiday

request of the Employes that an additional store employe be hired was denied on August 25, 1947.

Copies of all of the above correspondence, consisting of eighteen pages, are attached hereto as Carrier's Exhibit "B" and made a part of this record.

POSITION OF CARRIER: This matter has been handled by the Employes in an unbusiness-like manner. Here we have the spectacle of the Carrier proceeding in good faith and in collaboration with a duly accredited representative of the Employes, namely, the General Chairman, and setting up a definite arrangement providing for regular rest days for an established force of laborers and then immediately one in a subordinate position as representative of the Employes, namely the Local Chairman, challenging the action of the General Chairman, protesting the transaction, objecting to it, and causing time claims to be filed, which claims have been progressed by the Employes as a craft or class. This was carried to the point that the General Chairman, after allowing the arrangement to stand for about ten weeks, sought to back out of it by asking for the return of a certain confirmatory letter, dated June 17, 1946, (See Carrier's Exhibit "B"), so that he might "destroy same."

Representatives of the Carrier have been told many times by representatives of the Employes, in negotiating the revised Sunday and holiday rule in 1946 and in working under it since that time, that the objective of the Employes is, and their greater interest lies, in obtaining for their class or craft a regular off-duty day each week for the purpose of rest and recretion rather than to work them all the time and get the greater compensation yielded thereby, and yet, in spite of that, we have here a situation wherein a small group of employes, who, we understand, are actually satisfied with the plan—whereby they do not work on one day each week, have filed claims, punitive and cumulative in their nature, whereby for six days work they asked for seven and one-half days pay each week and retroactively to June 27, 1946.

General Chairman's letter of June 17, 1946 shows that it was his opinion that no agreement was necessary to cover the employment of an additional laborer which would provide five days of relief work and one day of work outside of relief work.

Our understanding of the position of the Employes, in discussing this matter with their representatives in conference, is that under the working agreement rule, a regular relief program, free of penalty payments, can be arranged only when there are groups of six employes. Such a position is contradictory to that portion of the March 1, 1946 supplemental agreement (Carrier's Exhibit "A") which provides:

> "Relief service required over and above that which is provided for by regularly assigned six days per week relief positions will be performed by extra employes, if available."

Carrier relies on the June 17, 1946 letter of concurrence of a duly accredited representative of the Employes and on the supplemental agreement of March 1, 1946 to sustain its position that the time claims submitted herein by the Employes are not due or payable. Carrier asks that the claims be denied.

Exhibits not reproduced.

OPINION OF BOARD: On April 1, 1946, the Organization and the Carrier became bound by an agreed application of their Rule on Sunday and Holiday work. This agreed application of said Rule provided:

> "1. Relief programs will be agreed to by and between division or department officers of the Carrier and Local Chairman of the Employes.
>
> "2. Relief service required over and above that which is provided for by regularly assigned six days per week relief positions will be performed by extra employes, if available."

This case requires an interpretation and application of this supplemental or "Lateral Agreement."

At the time this supplemental agreement became effective there were five regularly assigned laborers working daily in the Fort Worth Store Department of the Carrier. It is conceded that these positions were necessary to the continuous operation of the Carrier.

The Organization now contends that Section 2 of the supplemental agreement precludes the possibility of any relief program at stations where there are less than six positions necessary to the continuous operation of the Carrier and that, therefore, where, as here, there were only five such positions the employes occupying those five positions must be worked or paid on the seventh day.

The Organization also contends that Section 1 of the supplemental agreement must be interpreted as meaning that no relief program can be set up in any case unless it is agreed to by the Local Chairman of the Employes.

In this case a proposed relief program for the five positions was apparently submitted by the Carrier to the Local Chairman in a letter dated March 22, 1946, before the supplemental agreement became effective. In that letter the General Storekeeper said to Mr. Cole, the Local Chairman:

> "You advised that Mr. Pendleton (the General Chairman) would be in Fort Worth Monday and you would check this (proposes relief program) over with him. If the proposed program meets with his approval after conferring with him please sign all copies and send to me and I will sign them and return two copies to you."

On June 5, 1946, the General Chairman wrote to the General Storekeeper denying approval of the proposal of the letter to employ another laborer to relieve the five regular laborers at the Fort Worth store one day per week. By an argumentative letter, dated June 14, 1946, the General Storekeeper asked the General Chairman to reconsider this decision.

The General Chairman, by a letter dated June 17, 1946, showed that he did reconsider his decision. In that letter he said:

> "Your request to assign the relief position to cover the relief for laborers at the Fort Worth store I consider would not be an extra employe, as you proposed to me that he would be put on regularly, which would make him a regular instead of an extra employe. However, I am not concerned too much about laborers; these positions are not subject to bulletin.
>
> "If you wish to hire a laborer that is your business, and you can work him as you see fit. However, I do not think it is necessary to enter into any agreement for the hiring and assigning of common labor."

Pursuant to this letter of the General Chairman, the General Storekeeper did establish at the Fort Worth store a relief program for the five laborers by employing another laborer to relieve the five laborers on five days of the week and then work at other labor on his sixth day.

After this relief program was set up, the Local Chairman telephoned the General Storekeeper objecting to the program and was referred to the General Chairman. The record shows no further contact between the parties on this question until September 10 when the General Chairman wrote to the General Storekeeper and, after referring to the letter of June 17, said:

> "After some study, we find that a portion of this letter was in error and we wish to withdraw same.
>
> "Will you kindly return this letter to me in order that I may, along with my copy, destroy same?"

This conduct on the part of the interested parties and their correspondence seems to clearly indicate that the parties were interpreting Section 1 of the Supplemental Agreement as giving the Local Chairman the privilege of approving relief programs but giving him this privilege subject to the supervision and direction of the General Chairman. The Carrier, therefore, had every right to rely on the approval of the General Chairman, as contained in his letter of June 17, as being the approval of the Organization of the proposed relief program. The official approval of the Organization once given and acted upon by the Carrier was not subject to be set aside by the General Chairman three months later by his asking for the return of his letter of approval in order that it might be destroyed.

Nor can we agree with the interpretation o fthe Organization that Section 2 of the Supplemental Agreement permits no relief except at stations where there are at least six regular positions necessary to the continuous operation of the Carrier. The entire Supplemental Agreement concerned the application of the standard Sunday and Holiday Work rule, the purpose of which was to provide relief for one day on seven day positions. At stations where there are six such positions relief service would be provided by an employe regularly assigned to furnish such service for six days. It would seem clear that what the parties to the Supplemental Agreement had in mind was that, wherever possible, the Carrier would furnish such relief service by an employe regularly assigned for six days to such relief service and that where this was not possible the relief service would be performed by an extra employe if available.

In interpreting this Supplemental Agreement, we must, of course, bear in mind the purpose of the principal agreement to which this agreement was supplemental. The purpose of both agreements was to furnish one day of relief on seven day positions. There would be no purpose in having a rule of the Supplemental Agreement which would make it impossible to provide relief at a station where there were less than six of said positions. It certainly could not have been the intent of the parties, by Section 2 of the Supplemental Agreement, to either deprive the employes in seven day positions at stations where there are less than six such positions of their day off or to force the Carrier to create new and unnecessary positions to bring the number up to six.

The Organization also seems to depend, to some extent, on the letter of the Assistant Vice-President and General Manager to the General Chairman, dated July 19, 1947, in which letter the Vice President and General Manager of the Carrier accepted the proposition of the General Chairman dated July 15, 1947. The letter of acceptance of the Vice-President and General Manager, however, said that the proposed settlement of the "particular dispute, resting on its own set of facts and circumstances, is agreeable to the Carrier" with certain reservations. The record disclosed no acceptance by the General Chairman or the Organization of the reservations or conditions named by the Carrier prior to August 8, when the Carrier withdrew its letter of acceptance. Without the Organization having agreed to the reservations of the Carrier there was not such a meeting of the minds between the parties as to constitute a binding agreement. The acceptance with conditions amounted to a counter-proposal. Prior to its acceptance by the Organization it could be withdrawn by the Carrier.

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 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 did not violate the current agreement as alleged in the claim.

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 18th day of October, 1948.