Award No. 4141
Docket No. MW-4113

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

H. Nathan Swaim, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

CLINCHFIELD RAILROAD COMPANY

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

(1) That the Carrier violated the Wage Agreement of 1941, and subsequent Wage Agreements of April 4, 1946, and May 27, 1946, by increasing the cost of rental to its employes living in houses owned by the Carrier;

(2) That the Carrier reduce the rental charges to its employes to the same level as they were in August 31, 1941; and that the employes affected by this violation be reimbursed for overcharge as a result of this change.

EMPLOYES' STATEMENT OF FACTS: On March 1, 1942 and February 1, 1947, the Clinchfield Railroad Company increased the rental charges of company-owned houses rented by certain employes coming within the scope of the Agreement with the Brotherhood of Maintenance of Way Employes. These increased rental charges are still in effect.

The Clinchfield Railroad Company made wage agreements with the Brotherhood of Maintenance of Way Employes effective December 1, 1941, April 4, 1946, and May 27, 1946, respectively. These wage agreements are by reference made a part of this Statement of Facts.

The Agreement dated December 16, 1944, between the parties of this dispute is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: The Fair Labor Standards Act of 1938 set a wage rate of thirty-six cents per hour as the minimum wage for the Railroad Industry. In meeting that minimum the Carriers were entitled to the benefits of Section 3(m) of the Fair Labor Standards Act which section allowed as a portion of wages paid, the reasonable cost, as determined by the Administrator, of furnishing board, lodging, and other facilities if such facilities were customarily furnished by the Carrier. We quote Section 3(m) of the Fair Labor Standards Act for ready reference:

> "(m) 'Wage' paid to any employe includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employe with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employes."

It is the contention of the Carrier that the rules and statutes relied upon by Employes in their claim are not applicable to the case at hand, and that any increase in rental charges that Carrier might have made did not violate any Wage Agreement nor the separate agreement between Carrier and its Maintenance of Way Employes.

The payroll deduction by means of which Carrier collects its rent from some of the employes, is the same method by which it deducts certain store accounts, Employes' Credit Union deposits, Railroad Retirement premiums, Insurance Premiums, and other deductions to which the employe himself agrees and directs or requests the Management to deduct from his pay check. The deduction made for rent payments is optional with the employe occupying a company house. All deductions, however, are made from the total pay under the fixed wage scale of the individual employe, and are not deductions from the rate of pay on account of anything furnished by Carrier. Nothing is so furnished and, consequently, nothing is so deducted.

Carrier contends that there has been no deduction from the rate of pay of any employe, and no charge made for the rent of any house owned by it that could in any way be construed as coming within the provisions of the statutes and agreements relied upon by Employes in their claim, and herein quoted, and respectfully insists that there has been no violation of any agreement, and, therefore, requests that this claim be denied.

OPINION OF BOARD: This claim presents the question of whether the Carrier violated the 1941 and subsequent wage agreements by increasing the rentals on its houses which were being used by certain of its Maintenance of Way employes.

The Fair Labor Standards Act of 1938 set a minimum wage rate of 36¢ per hour for the Railroad Industry. Section 3 (m) of that Act provided that in determining whether a carrier was paying the minimum wage to its employes the "wage" could be considered as including "the reasonable cost, as determined by the Administrator, to the employer of furnishing such employe with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employes."

The parties to this dispute were both parties to an agreement made as of December 1, 1941 which in Section (2) thereof provided for a minimum rate of 46¢ per hour and then provided:

> "From this minimum it is permissable to make deductions provided for by the Fair Labor Standards Act, for the reasonable cost of any board, lodging or other facilities furnished the employes, to the extent such deductions were being made as of August 31, 1941."

Section (4) of this Agreement provided that the wage increases agreed upon should be retroactive for the period from September 1, 1941, to November 30, 1941, both inclusive, and that deductions made during that period by the Carrier under the Fair Labor Standards Act should be unaffected thereby and should be retained by the Carrier as a credit in computing retroactive payments required by the section.

An agreement as to rules and working conditions between the parties to this dispute, effective December 16, 1944, provided Article 11 (i):

> "So far as is practicable, comfortable houses will be furnished Section Foreman. (Note:—This does not affect rental charges)."

This agreement of December 16, 1944, did not purpot to fix wages but only recited the rates which had been fixed by National Agreement.

Two later National Agreements in 1946 again increased wages and again included a provision which provided that the Carriers might continue to make such deductions from such incerased wages "to the extent that such deductions were being legally made as of August 31, 1941."

The Carrier owns and maintains along its railroad approximately 90 houses which it rents to employes. These houses were built by the Carrier because no other houses were near enough to the work which the Carrier desired certain employes to do. The Carrier, therefore, built the houses both for the convenience of the employes and in order to have the section foreman and supervisors reside near their headquarters.

These houses have never been furnished to the employes without charge. The rental charge is based on the size, condition, conveniences, and fixtures of each house. During the depression years of the 1930's the Carrier decreased the rents on these houses, lowering the rent on each individual house. On March 1, 1942, the rental charges were increased on some of these houses to the rate the Carrier had been charging before the depression. On February 1, 1947, the rental charge was increased on each house 50¢ per room. This latter increase was approved by the OPA Rent Control authorities where the houses were located in rent control areas.

The Orgainzation contends that these rents were frozen, by the December 1, 1941, and subsequent wage increase agreements, at the price the Carrier was charging on August 31, 1941, and that the increases in 1942 and in 1947 were, therefore in violation of the agreements of 1941 and 1946.

The Carrier insists that the rentals on such houses were not such deductions as were contemplated by the 1941 and the 1946 National Wage Agreements.

The Carrier contends that the rental charge on each house was fixed by an individual contract between the Carrier and the renter; that such charge was never considered by the Carrier as a part of the wages of the employers; that the employes had the option of either paying the rent in cash or of having the amount thereof deducted from the employe's wages; that only 13% of the 360 Maintenance of Way employes occupy such houses; that such houses are not furnished employes as part of their employment; that Article 11 (i) of the 1944 Agreement does not obligate the Carrier to furnish the houses to the employes free of charge; that it had never made deductions for rent as contemplated by Section 3 (m) of the 1938 Act; and that all wages were paid in accord with the December 16, 1944, Agreement.

It is not disputed that the houses in question were build and maintained by the Carrier and furnished to the employes in question because there were no other avaiable houses convenient to the location of the work which the Carrier wanted the employes to do. The furnishing of these houses, therefore, served as one of the inducements or considerations to the employes to take the particular positions involved. It can hardly be said, therefore, that the houses here in question were not being furnished to these particular employes as part of their employment.

The fact that only a comparatively small percentage of the Maintenance of Way employes were so furnished houses is not controlling. If they were ordinarily and usually furnished to and used by these particular employes at certain inaccessible locations, then they were "customarily" furnished to these employes within the meaning of the Fair Labor Standards Act.

"Customarily furnished * * * to his employes" could not be construed as meaning to all of the employes, or to even a majority of the employes. The section in question first speaks of the wage paid to "any employe" and then of the "board, lodging or other facilities" furnished to "such employe". We must, therefore, hold that "customarily" as used was intended to include those facilities ordinarily furnished to the employes in certain classes, positions or locations.

The Carrier stresses its statement that it took no credit for rent in computing back pay under Section 4 of the 1941 Agreement and made no deductions therefor under Section 2 of that Agreement. Its statement begs the question. It does not deny that it either deducted or received the rent and kept it. The question we must decide is whether the rental for these houses constituted such a deduction as the parties were describing in Section 2 and Section 4 of said 1941 Agreement. If it did constitute such a deduction, the 1941 and the 1946 Agreements clearly provide that the amount thereof *could not be increased beyond the amount being charged by the Carrier* on August 31, 1941.

In its orginal submission the Carrier stated that the majority of the employes preferred to pay the rent by having it deducted from their pay check. The Organization in its reply to the Carrier's Position insisted that all employes involved paid their house rental by payroll deduction and challenged the Carrier to refute the statement by evidence from its records. The Carrier refused to accept this challenge. We must, therefore, find that all such rentals were paid by payroll deductions.

The Carrier insists, however, that such payment of rent by payroll deduction does not constitute a deduction from the rate of pay for facilities customarily furnished the employes "any more than do the payroll deductions made by Carrier for such items as insurance premiums, correspondence school installments, store accounts (such store not being owned by the company), Y. M. C. A. dues, United States bonds and other items deducted solely for the benefit and convenience of the employe. * * *" It is obivous that all of the other deductions listed are payments by the employe to others than the Carrier and that none of such deductions is for board, lodging or other facility customarily furnished by the Carrier to its employes.

The Carrier also stresses the fact that the general increase in these rentals was in some cases approved by the Rent Control Authorities of the OPA. The Rent Control Authorities have never had the power to increase rentals beyond the amount the interested parties have contracted for. Such approval could only amount to evidence that in the opinion of such authorities the rentals, as increased, were reasonable and in line with other rentals in that vicinity.

That fact is immaterial if the parties have agreed on a different amount.

The Carrier has cited us to two Federal District Court decisions contending that the decisions support the Carrier's contentions.

The first such case cited by the Carrier is Brotherhood of Maintenance of Way Employe et al vs. Nashville, C. St. L. Ry. 56 Fed. Supp. 559. In that decision the Court refused to enter a judgment for the enforcement of Award No. 1727 of this Division. In that case the Court held that the Carrier was *entitled to credit for board which it customarily furnished to extra gang* laborers to bring the total "wage" of such employes up to the required minimum of 36¢ per hour.

In the course of its opinion the Court used the following language quoted by the Carrier:

> "The words 'customarily furnished by such employer to his employes', as used *in provision of Fair Labor Standards Act* declaring that wages paid includes reasonable cost to employer of furnishing employes with board, lodging, or other facilities, customarily furnished by such employer to his employe, means customarily furnished as part of the wages."

"Wage" as used in this quoation and as used in Section 3 (m) of the Fair Labor Standards Act as shown by the context means more than the ordinary money wages; it also includes board, lodging and other similar facilities furnished to employe in connection with his work or as a part of his employment.

The other case cited by the Carrier, Walling vs. Peavy Wilson Lumber Co., 49 Fed. Supp. 846, involved no agreement between the parties such as we have here, but the case did expressly hold "that the phrase 'or other facilities' (as used in the Fair Labor Standards Act) it to include the relation of landlord and tenant."

In our opinion the rental charges on these houses did constitute such deductions as the parties intended to freeze at the August 31, 1941, level by their 1941 and 1946 Agreements. The increase in such rentals in 1942 and 1947, therefore constituted a violation of said Wage Agreements.

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 parties waived oral hearing thereon;

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

The Carrier violated the Agreements as alleged in the claim.

AWARD

Claims (1) and (2) are sustained.

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.