Award No. 4467

Docket No. CL-4386

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Francis J. Robertson, Referee

PARTIES TO DISPUTE:

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

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS

STATEMENT OF CLAIM: Claim of the Terminal Board of Adjustment, Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes, that the Carrier violated the Clerks' Agreement—

(1) When on various dates as stipulated in Exhibit 1, attached hereto and made part of this Statement of Claim, it failed to fill positions necessary to continuous operation in the Baggage Mail Department seven days each week as contemplated and required under provisions of Rule 44, revised, effective November 18, 1947 (Standard Sunday and Holiday rule) and

(2) That the claimants named in Exhibit 1 hereto attached, be paid eight hours at time and one-half rate for dates specified.

EMPLOYES' STATEMENT OF FACTS: Under date of October 16, 1947 the parties entered into an agreement effective November 18, 1947 as a result of a recommendation of an Emergency Board appointed by the President of the United States on August 6, 1947, and a copy of that Agreement is attached hereto as Employes' Exhibit "A". This agreement (Employes' Exhibit "A"), among other things, eliminated the note at the bottom of Rule 44 of the agreement effective April 1, 1945, and the Carrier was thereby required thereafter to fill positions necessary to continuous operation in the Baggage and Mail Department seven days each week, the same as it had previously filled positions necessary to continuous operation in all other departments.

The claims here involved, as a result of the carrier's failure to fill positions necessary to continuous operation in the Baggage and Mail Department, after the effective date of the agreement (Employes' Exhibit "A"), are only a portion of the actual violations, it being impossible, due to the nature of the operations, and the fact that the Carrier hires a great number of new employes during the Christmas season to completely and properly police the agreement during that period. The Carrier seemed apathetic about trying to properly apply the revised rule, and during negotiations, which culminated in the agreement (Employes' Exhibit "A"), offered several codes under which it preferred to operate, each of which would have invalidated the rule, and the organization insisted that the rule be applied in the Baggage and Mail Department, as it was and had been applied in all other departments for a number of years.

OPINION OF BOARD: This claim arises (1) because of the blanking of seven-day positions necessary to the continuous operation of the Carrier on certain days when the occupants thereof failed to report for work on account of sickness or other reasons and (2) because of the filling of some of the positions with employes from a so-called field crew, established by Carrier in November of 1947, which crew was composed of employes also on a seven-day basis. The claim is on behalf of regularly assigned employes who were off on relief on the dates mentioned in the claim, there being no extra or furloughed employes available.

With respect to the filling of the positions by the so-called field crews, Carrier argues that that arrangement was proper. Carrier says that the volume of mail incident to Christmas starts to increase about November 1st and continues at a high level until Christmas Day or shortly thereafter, making it imperative that a full complement of men be in the crews during that period. Therefore, in order that the handling of United States mail would not be delayed, these crews were established, the members not being assigned to any particular work but being used to fill the short notice vacancies, the remainder being worked as an addition to the regular crews.

We cannot agree with the Carrier's contention with respect to the propriety of filling these vacancies with the members of the so-called field crews. What the Carrier has done here is to set up this field crew as a distinct unit with regular assigned positions on a seven-day basis, thus entitling it to secure the services of these employes on Sundays without the obligation of paying a punitive rate for work on such days. Then it asserts the right to blank the field crew positions in order to fill other positions which it acknowledgedly is without right to blank. We cannot see how any distinction can be made between the blanking of the so-called "field crew" positions and the blanking of the regular positions when positions in both categories are on the seven-day basis. It is just as much a violation of the Agreement in our opinion to fill the regular positions with members of the field crew as it is to blank the regular positions.

With respect to the claims arising because of the blanking of positions, Carrier divides them into two categories, saying:

> "The remainder of the claims involved cases where positions of absent employes were blanked because no extra or furloughed people were available and the claimants off on their relief day were not available because there was no way to contact them and cases in which the particulars were similar, except the claimants had telephones in their homes or nearby where they could be called. The vast majority of the employes in the Mail and Baggage Department do not wish to work on their relief days and for that reason we asked the General Chairman to have the claimants who had provided means of call furnish us a statement to the effect they were available and would have worked on dates of claim had they been called, following which the claims would be given further consideration. This he declined to do. There is no basis for such claim in the absence of statements indicating 'availability'."

The difficulty with the position of the Carrier as above stated is that nowhere does it show that it made any attempt whatsoever to contact any of these employes whether they had listed a means of communication with it or not. If effort had been made to contact any of the claimants and they were found unavailable or unwilling to work, there would appear to be good reason for denying a claim for such employes. But here the Carrier blanked the positions without any attempt at filling them and thus violated the Agreement. At that time then it made itself liable for a penalty for such violation. It cannot now escape that liability by demanding statements of availability and willingness to work if called from Claimants who left means of communication with it or by pleading that others were unavailable because they left no means of communication with it. Under the circumstances here present Carrier is liable to pay any employe under the Agreement who could have performed the work. In this respect Carrier has called attention to two

dates in the claims, January 4, 1948, where claim is made for occupant of Crew 31, Job 1, which latter position was occupied by J. P. Mergaen who was off duty all month due to an injury and to December 27, 1947, where one claimant makes claim for two jobs on one crew. Obviously, the one claimant could not have performed two jobs during the same hours on the same day and a man off because of disability could not work. As to the one job on December 27, 1947, and the job on January 4, 1948, the claim shall be sustained for such other employes under the Agreement in order of seniority who could have performed the work on those days. If there be none such, then the claim for not having filled such jobs on the dates mentioned must fail.

Should the claim be sustained at the pro rata rate or at the punitive rate? This is a penalty payment. Under the circumstances, the rate should be that which the employe to whom the work was regularly assigned would receive if he had performed the work. Hence, the pro rata rate applies.

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 violated the Agreement.

AWARD

Claim sustained to extent indicated in Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 19th day of July, 1949.