Award No. 5075

Docket No. CL-5055

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

A. Langley Coffey, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE & OHIO RAILWAY COMPANY

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

(a) The Carrier violated Clerical Agreement No. 7 and verbal agreement in connection therewith dealing with the proper payment to employes in the Russell, Kentucky, seniority district when it failed and refused to compensate them at the rate of time and one-half time for service performed on their day of rest between the periods March 26 and December 28, 1948, and

(b) That all employes on the Russell seniority district who were required to work on their day of rest between March 26 and December 28, 1948, be compensated for 8 hours' service on such days at the rate of time and one-half time.

EMPLOYES' STATEMENT OF FACTS: In the Russell, Kentucky seniority district, the Carrier worked a certain number of positions six days per week in service not necessary to the continuous operation of the Carrier, Sunday being assigned as one of the regular work days, the employes assigned to such positions being given a day of rest other than Sunday, the positions not being assigned to work on their rest day, but when the Carrier found it was in need of additional help, the employes assigned to these positions would be called out on their day of rest and paid pro rata rate for such service.

The employes assigned to these six-day positions were, of course, paid time and one-half time for service performed on Sunday as provided in Rule 39(a) because the rule required time worked on Sundays to be paid for at the rate of time and one-half time. It was the contention of our Organization that when employes assigned to such positions were called out on their day of rest, they were entitled to punitive rate for the day, however, the Carrier refused to so compensate the employes and this dispute existed until January 4, 1945.

On October 23, 1944, Award 2675 of the Third Division, N.R.A.B., clearly resolved this dispute and on January 4, 1945, the undersigned conferred with Mr. George M. Seaton, Assistant to Mr. J. B. Parrish, Vice President in charge of Personnel, Mr. Seaton being the employe designated to handle clerical matters, and after a review of the Award and a full discussion of the matter, it was agreed that the employes were entitled to time and one-

the General Chairman to continue the arrangement until such time as he elected to serve notice to discontinue it. From a purely practical standpoint, it is certainly not reasonable to believe that the Carrier would have intentionally ignored the General Chairman's alleged notice of March 26, 1948, and sat idly by for 9 months permitting costly and unnecessary penalty payments to pile up.

The Carrier maintains that it acted promptly and in good faith upon being notified for the first time on December 28, 1948, to discontinue the agreed to practice in question at Russell. We submit that in view of the Carrier's undoubted good faith in this matter, the confusion of the record as to the date on which the verbal notice is alleged to have been given, and the inherent improbability that a notice of such importance would have been given so casually, it would be highly unfair to subject the Carrier to retroactive payments to employes who were not in any way damaged, but who were working under an arrangement which seemed satisfactory to all parties concerned until it was terminated on December 28, 1948; and that under all the circumstances the employes have failed to sustain the burden of proving that any notice was given by them prior to the latter date.

Accordingly, for the reasons stated herein, the claim should be declined.

(Exhibits not reproduced.)

OPINION OF BOARD: The claim puts in issue a question of fact as to when the Carrier was first put on notice that the Organization had rescinded an earlier verbal agreement which had made the principles established in Award 2675, applying to Rule 39(a) of the subject agreement, inapplicable in the Russell, Kentucky, seniority district.

The Organization contends notice was given on March 26, 1948. The Carrier admits notice as of December 28, 1948, but disclaims earlier notice.

There is of record statements of persons in attendance at a meeting on March 26, 1948, at which the Organization contends the notice was given. The Organization's statements have a positive tone. Carrier's statements do not deny unequivocally that the notice was given, but only certify to an absence of knowledge or record. Where evasive terms are used, one is left with the feeling that the notice could have been given, but the passage of time has clouded memories.

It is a well known and generally acceptable principle for weighing conflicting statements that those which are positive, therefore affirmative, have greater probative force than do those which are evasive and equivocal, therefore negative.

Further, there are circumstances established by the record supporting the claims. On May 11, 1948, the General Chairman wrote the Division Chairman that the earlier verbal agreement had been rescinded on notice to the Carrier as of March 26, 1948, and requested that the employes be informed. Pursuant thereto claims were filed beginning August 24, 1948, for punitive rates of pay covering "rest day work" back through May. Though the Carrier is required by Rule 37, upon disallowing a claim, to notify the employes in writing, the Carrier took no action on the claims until March 29, 1949.

We think it hardly stands to reason that the General Chairman, being, as he was, cognizant of an outstanding agreement, would have taken the steps he did to acquaint the employes of the reinvestment in them of rights enjoyed under their contract, before giving notice to cancel the verbal agreement. In point of time the action was comparatively close to the date of alleged notice and such delay ensuing is satisfactorily explained.

On the other hand, the Carrier has shown a lack of diligence, in the handling of a matter of contract, in a situation where it must have known that

its protection against liability was hanging by a fragile claim of a verbal exception to a written agreement. From this it can be inferred that it was not as attentive to the background of these claims as was the Organization.

Accordingly, it has been concluded that the weight of the evidence dictates a finding that notice was given on March 26, 1948, as alleged.

The second portion of the claim, (b), is for 8 hours' service at time and one-half time for such days as employes were required to work on their day of rest between March 26 and December 28, 1948. Carrier opposes on the grounds that there is no justification for the payment of two days, in a period of seven consecutive days worked, at the rate of time and one-half. The authorities to which our attention has been called, in support of the Carrier's position, are not in point. They apply to situations where there was a failure to call employes entitled to the work, or where the employe was wrongfully held out of service, or for some reason a position to which claim was made was not filled. None involve a situation where the employe, on whose behalf claim is made for compensation, actually worked.

In Award 2675 the Board said:

> "The interpretation placed upon a contract relates back to its inception and a party may not gain an advantage because it acted, or failed to act, on a misapprehension as to its obligations."

To deny the claims for punitive rates would, in our opinion, permit the Carrier to profit from its wrong. And as said further in Award 2675:

> "Where the Carrier finds itself in the unfortunate situation of being subject to liability for pyramidal penalties, that must be attributed to its failure to properly apply the Agreement in the first instance."

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 the Carrier violated the Agreement on and after March 26, 1948, to December 28, 1948, particularly Rule 39(a).

AWARD

Claims (a) and (b) sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 26th day of October, 1950.