Award No. 5761

Docket No. CL-5799

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Livingston Smith, Referee

PARTIES TO DISPUTE:

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

TEXARKANA UNION STATION TRUST

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

(1) Carrier violated rules of Agreement, effective March 5, 1945, when, following a force reduction abolishing twenty-eight (28) assigned Mail and Baggage Handlers' positions at Texarkana Union Station, effective Sunday, January 16, 1949, it by unilateral action on the following Tuesday, January 18, 1949, established practice of recalling to service the laid-off employes for work periods of less than a day's work—8 hours—and compensating them for the actual time worked.

(2) That B. B. Hatcher, and all other employes involved*, be allowed a day's pay for services performed on Tuesday, January 18, 1949 and on all subsequent dates that they were unilaterally laid off prior to completing their day's work period of eight (8) hours.

EMPLOYES' STATEMENT OF FACTS: Our initial Agreement with the Texarkana Union Station Trust, governing the hours of service and working conditions of the Employes represented by the Brotherhood, was effective September 8, 1933.

This Agreement provided:

> "Rule 19. * * * Employes engaged to take care of fluctuating or temporarily increased work will receive pro rata rates for the hours actually worked."
>
> "Rule 35. * * * Employes engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular forces on seven (7) day assignments will receive pro rata rates for the hours worked."
>
> "Rule 37. Mail handlers and baggage handlers will be paid on an hourly basis; all other employes will be paid on a daily basis. * * *"

A dispute arose between the Employes and the Management in regard to the application of these particular rules of the Agreement. The case was

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*Note: The reparation due individual employes to be determined by joint check of Carrier's records by Management and Employes' representatives.

might call the Board's attention to the fact that this agreement was entered into January 31, 1949, while the occurrence of the instant alleged violation was on January 18, 1949.

Third Division Awards
Deny the Instant Claims.

In addition to Award 737 of the Third Division there are other awards of that Division which deny similar claims.

Award 897 (B.R.S.C. v. The Texas and Pacific Railway) denies a similar claim on the part of extra part time mail and baggage handlers at Fort Worth, Texas. The Third Division in that Award did not go into the merits of the claim inasmuch as a System Board had ruled on a similar claim and the Referee in Award 897 felt that the parties were bound by the System Board's decision. We respectfully request that the Third Division consider the argument in that case as equally applicable to the instant claim.

Award 900 (B.R.S.C. v. Kansas City Terminal Ry. Co.) sustains the practice of using part time gatemen.

Award 2671 and its companion awards 2670 and 2672 of your Division are very much in point concerning the use of part time employes under a rule similar to rule 26 of the Clerks' Texarkana Union Station Trust Agreement. The claims asserted there were denied.

Award 4731 issued by your Board, with the aid of Referee Francis J. Robertson, is also an analogous case insofar as part time employes are concerned. The claim in that case was also denied.

In conclusion: We must stress the fact that the Carrier has complied with the express provisions of the working agreement between the parties. In using part time employes the Carrier has not ignored the principles of seniority but has diligently attempted to maintain sufficient regularly assigned positions to meet the needs of the service. It is surely not the desire of the Committee that so many regular jobs be established that the Carrier only secures a few hours work for eight hour's pay.

Our use of extra-part time mail and baggage handlers is brought about by unpredictable variations in the volume of mail traffic, a large portion of which we receive as little as one hour's advance notice of its arrival, the high rate of absenteeism prevalent with this class of labor, due to sickness, laying off for personal reasons, etc., combine to make the employment of extra-part time men absolutely imperative in the operation of the mail and baggage department of this Carrier.

We submit that the claim herein is wholly unfounded and without merit, and respectfully request that it be denied.

It is affirmed that all data submitted herein in support of the Carrier's position have heretofore been presented to the Organization and are hereby made a part of the question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: The presently effective Agreement between the parties bears date of March 5, 1945, and amended September 1, 1949.

Claim is here made that the Respondent acted in contravention of Rules 24 and 34 in abolishing 28 assigned Mail and Baggage Handlers' positions on January 16, 1949, by unilateral action and subsequently establishing the practice of recalling said laid off employes for periods of less than a day; and making payment for the hours so worked, rather than on a daily basis as required by Rule 34 (a).

Rules 24 and 34 (a) and (b) read as follows:

"Rule 24. Except as otherwise provided in Rules 25, 26 and 29, eight consecutive hours, exclusive of the meal period, shall constitute a day's work as to all regularly assigned employes, for which eight hours' pay will be allowed."

"Rule 34. (a) Employes covered by these rules shall be paid on a daily basis.

(b) Nothing herein shall be construed to permit the reduction of days for regularly assigned employes covered by these rules below six (6) days per week, except that this number may be reduced in a week in which holidays specified in Rule 33 occur by the number of such holidays."

The Respondent asserts that its action was proper for the reasons hereinbelow set out.

The record indicates that the rules pertinent to the issue here were made a part of the Agreement as a result of an award by a Board of Arbitration. An Arbitration Agreement was entered into by the parties on December 24, 1944. The Board of Arbitration sitting pursuant to this Arbitration Agreement, issued its Award, and the rules contained therein were incorporated in the then effective Agreement and carried forward into the current Agreement.

The Respondent contends that:

(1) Paragraph Fifteenth of the Arbitration Agreement reading as follows:

"**FIFTEENTH:** Any difference arising as to the meaning or the application of the provisions of such award shall be referred for a ruling to the Board or to a subcommittee of the Board agreed to by the parties thereto; and such ruling, when certified under the hands of at least a majority of the members of such Board, or, if a subcommittee is agreed upon, at least a majority of the members of the subcommittee, and when filed in the same district court clerk's office as the original award, shall be a part of and shall have the same force and effect as such original award."

vests in the Board of Arbitration (or a subcommittee thereof) exclusive jurisdiction to settle misunderstandings as to the meaning or application of those portions of the Award, and/or agreement that are here at issue; or

(2) That if the Board finds it has jurisdiction, then, and only then, the letter of interpretation from the Carrier to the Organization bearing date of February 17, 1945, (Carrier's Exhibit "E") should, in view of the Union's silent acquiescence, and its continued application by the Carrier, be accepted as evidence of existing custom and practice, and

(3) That existing rules, namely Rule 24 (above quoted) and Rule 26, which reads as follows:

"Rule 26. (a) Employes required to report for work at regular starting time, and prevented from performing service by conditions beyond control of the Management will be paid for actual time held with a minimum of two (2) hours.

(b) If worked any portion of the day, under such conditions, up to a total of four (4) hours, a minimum of four (4) hours shall be allowed. If worked in excess of four (4) hours, a minimum of eight (8) hours shall apply.

(c) All time under this rule shall be pro rata.

(d) This rule does not apply to employes who are engaged to take care of fluctuating or temporarily increased work which cannot be handled by the regular forces; nor shall it apply to regular employes who lay off of their own accord before completion of the day's work."

clearly substantiate the propriety of the action taken, and

(4) That this Board's Award 737 and Interpretation No. 1 thereto, which involved the parties hereto, and subject matter hereof, clearly denied the Organization's request, as is here made.

Petitioner states that, with one exception, no short hour assignments were used during 1944 and 1945, and that from that time until the date of this claim short hour employes were used only intermittently and in small numbers. It is asserted that the record indicates there were 176 regular jobs in 1945, but that after the abolishment of 28 regular positions, there remained only 120 to 150 regular positions with a corresponding increase in the use of short hour help but without an appreciable decrease in the work load.

The position is taken that none of the exceptions stated (Rules 25, 26 and 29) in Rule 24 are applicable here and that Rule 24 contemplates the use of only eight hour regular positions, paid on a daily basis, (Rule 34(a)) under facts and circumstances of record. It is also contended that the application of Rule 34(b) does not apply to regular employes.

The Award of the Board of Arbitration contained certain recommendations (rules) that were written into the then current Agreement. These rules were carried forward into the presently effective Agreement.

The Arbitration Agreement, entered into by the parties on December 24, 1944, cannot properly be construed as conferring upon or delegating to the Board of Arbitration any powers of interpretation concerning the presently effective Agreement. Exclusive jurisdiction is delegated to this Board under Section 3, First (i) of the Railway Labor Act, to hold hearings, make findings, and enter awards in all disputes between Carriers and their employes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions (Slocum vs. Delaware, L. & W. R.R. Co.) 339 U.S. 239.

Likewise, the Respondent's contention that the Organization by its silence accepted the interpretation of the rules as set out in a communication dated February 17, 1947, is without merit. While a request was made of the Organization to execute the aforementioned document, signifying its approval, the suggestion or request was not complied with. Under these circumstances it cannot be said that this interpretation was acceptable to the Petitioner.

Thus, the issue before the Board is whether or not the existing rules permit the use of part time or short hour employes, in the manner or under conditions here present.

The rules at issue here, as set out above, clearly contemplate that there will be two types of employes, extra employes and regular employes.

It is well settled that prerogatives of management include the abolishment of positions, save and except that such act must not result in the abridgment, or loss of rights, accruing to employes under other provisions of the Agreement.

Award 737, and the Interpretation thereof, was concerned with the proper application of slightly different rules but the findings therein are at least in part properly applicable herein.

Here, as there, it is incumbent on the Respondent to establish and maintain the number of full time (that is eight hour) positions as are required to handle the normal or average amount of work to be performed. The holders of these positions are entitled to be compensated on a daily basis under Rule 34(a).

The use of part time or hourly paid workers is contractually permissible to handle a temporarily abnormal or inordinately high and unexpected flow of business. These employes can be paid for the hours worked except when they are filling a full time position (vacant due to the absence, illness, physical incapacity or other cause) of the incumbents thereof. In that instance, the employe is, and should be considered as holding a full time assignment, with assigned hours, and entitled to compensation as such on a daily basis.

The record as a whole indicates that since the institution of this claim the Carrier has on occasions improperly compensated part time employes when they were filling positions of regularly assigned employes.

A joint check of the Respondent's records can and should be made to determine when this was done and the affected employes paid reparations accordingly.

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 Agreement was violated to the extent indicated.

AWARD

Claims sustained to the extent indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois, this 14th day of May, 1952.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 5761, DOCKET NO. CL-5799

NAME OF ORGANIZATION: Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes.

NAME OF CARRIER: Texarkana Union Station Trust.

Upon application of the representatives of the employes involved in the above Award, that this Division interpret the same in the light of the dispute between the parties as to its meaning and application, as provided for in Section 3 First (m) of the Railway Labor Act, approved June 21, 1934, the following interpretation is made:

The Petitioner here seeks an Interpretation of this Award on the premise that the Carrier has not effectuated the clear directive of the Board as evidenced by the Opinion, Finding and Award herein.

It is asserted that this Board, in substance, found and concluded that the Carrier had failed to establish and maintain the necessary number of full-time positions during the time in question and that the parties should now, by way of a joint check, determine the number of full-time positions which the Carrier failed to maintain, and compensate each senior extra employe who was not paid for eight (8) hours' work each day (less any amount earned by such employe) that the required number of full-time positions were not so maintained.

Here, as is proper in all cases, the interpretation and application of cited rules were considered and applied to the facts of record within the scope of the claim as presented to the Board and handled on the property.

All instruments in writing should, and must be interpreted as a whole. This is certainly true of the Opinion of the Board. Each single factor, conclusion or finding enumerated has a proper relation to others contained therein.

The Board determined that the issue to be resolved was whether or not the rules permitted the use of part-time or short-hour employes; thus all findings relate to resolution of this issue.

The Board found that the rules contemplated the use of two types of employes (1) regular employes and (2) extra employes, with regular employes occupying and/or filling the required number of positions necessary to handle the normal or average amount of work; and extra employes handling (a) temporarily abnormal or inordinately high peak loads, and (b) the filling of vacancies arising in full-time positions due to causes enumerated, with remuneration in these instances to be on a daily basis, in those cases where such compensation had not been paid.

The adoption of the contentions advanced by the Petitioner as to the proper interpretation and application of the Award would require this Board to resolve issues beyond the determined scope of the claim.

Referee Livingston Smith, who sat with the Division as a Member when Award 7561 was adopted, also participated with the Division in making this interpretation.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 30th day of March, 1954.