

Award No. 7644
Docket No. CL-7533

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Edward A. Lynch, Referee

PARTIES TO DISPUTE:

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

WESTERN WEIGHING AND INSPECTION BUREAU

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

(a) The Bureau violated the Clerks' Agreement when it required by unilateral action the occupants of Positions 529 and 520 in the Fruit and Vegetable Department, St. Louis, Missouri, to work these positions on an assignment Sunday through Thursday with Friday and Saturday as rest days.

(b) Claim that the incumbents of Positions 529 and 520 be placed on an assignment Monday through Friday with Saturday and Sunday as rest days.

(c) Claim that the occupants of Positions 529 and 520 be compensated subsequent to September 1, 1949, for each Friday at the straight time rate and each Sunday at the time and one-half rate.

(d) Claim that the occupants of Positions 529 and 520 be compensated at time and one-half for all services rendered prior and after the assignment 6:00 P. M. to 2:00 A. M.

(e) The Bureau be required to make a joint check with Employees' representatives in order to determine the correct hours of service performed by the incumbents prior to or after their regular assignment.

EMPLOYEES' STATEMENT OF FACTS: The Bureau through unilateral action assigned Positions 529 and 520 to an assignment Sunday through Thursday with Friday and Saturday designated as rest days to begin September 1, 1949.

The Employees did not agree with the Bureau on this assignment and attempted, before filing appropriate claim, to determine the correct hours of assignment that would apply to these positions, in view of the Employees not having available copy of bulletins, Employees' Exhibits 1 to 5 inclusive.

On August 18, 1950, the Employees filed claim in behalf of the two positions in the Fruit and Vegetable Department that were assigned to per-

The evidence herein presented is clear and in your deliberations there can be but only one conclusion and that is the claim is without merit and should be denied.

All data contained herein has been presented to the Employees.

(Exhibits not reproduced.)

OPINION OF BOARD: This case turns on whether or not the Organization and Bureau agreed on August 17, 1949 that Positions 529 and 520 could continue to be worked on a Sunday through Thursday basis, with Friday and Saturday off, as Bureau alleges.

Position 529 is a Perishable Fruit Inspector, assigned to inspect perishables received and unloaded at the Fruit Auction. Position 520 is that of Cooper, assigned to recooper packages of perishable freight received in a broken or bad condition.

Employees of the Fruit Auction Company do all the unloading and stacking during night hours. Positions 529 and 520, therefore, work in advance of such unloading. They start from one hour to one and one-half hours in advance of the unloading process, which permits 529 to break the seals, open refrigerator car doors, insert thermometer in the fruit to determine temperature, etc., and allows 520 time to repair packages damaged in transit and thereby minimize Carrier's loss.

Historically, then, Positions 529 and 520, by the very nature of their duties, operate and perform these duties in advance of the unloading and stacking work performed by the Fruit Auction Company's employees.

So the matter might be placed in its proper perspective, it should be pointed out here that Bureau asserts, and it is not denied by Organization, that Fruit Auction Company employees have, through the years, worked only at nights, and only on a Sunday through Thursday basis.

Bureau asserts, and Organization makes no denial, that "the Fruit Auction is closed and locked on Friday and Saturday nights," with few exceptions.

In order to determine the issue, cited at the outset of this opinion, it is necessary to point out that the Forty-Hour week in the railroad industry became effective September 1, 1949.

Organization makes reference inter alia, to Rule 28-(b) of the applicable agreement changed to conform to such National Forty Hour Week Agreement:

"Five-day Positions—

"On positions the duties of which can reasonably be met in five days, the days off will be Saturday and Sunday."

However, as Bureau points out, if all assignments could have been arranged on a Monday through Friday basis with Saturday and Sunday off, there would have been no need for further conference.

On July 23, the General Chairman asked the Bureau to prepare "... as soon as possible a list of all positions in each district, showing their contemplated assignment and days of rest, then notify this office so that we may meet in conference to see if we can mutually agree with the list as first prepared."

Four days later Bureau agreed to such conference, and on August 16 and 17 the meetings were held.

Attending the August 16 meeting with the General Chairman were four officials of the Bureau: D. J. O'Connell, Assistant Manager; N. J. Miller, General Supervisor-perishable, E. J. Clark, Traveling Supervisor-perishable, and M. F. Donohue, District Inspector.

Organization asserts that when the General Chairman first arrived (presumed to be August 16) in Mr. D. J. O'Connell's private office for the purpose of reviewing the program the Bureau was going to adopt, none of the other Bureau representatives (Miller, Clark and Donohue) were (sic) present, therefore . . . (they) would certainly be in no position to testify as to what the General Chairman said at the opening of this Conference to Mr. O'Connell.

We quote from Organization's Rebuttal brief:

" . . . When the General Chairman informed . . . O'Connell . . . that the employees were protesting any and all positions that had assignments other than Monday through Friday, . . . (he) did not feel it was necessary to make this same protest at the beginning of each day's conference. . . ."

The record made by the Organization makes little reference as to what may have transpired in the August 16 conference, but the Bureau maintains the record shows that the General Chairman had to be convinced of the necessity for any deviations from straight Monday through Friday assignments. There is no evidence to support the General Chairman's statement that at the beginning of these conferences he stated any work week schedule other than Monday through Friday was protested, other than his own statement in this record.

Bureau makes the further point that had such a general protest been registered by the General Chairman, ruling out all compromise from the very beginning, the holding of the conferences on the two days would have been futile, and Bureau would not have called Mr. Donohue back to Chicago for the second day's conference.

Bureau asserts it presented its initial schedule to the General Chairman on the first day. Such schedule, it asserts, places 12 of the positions in the Perishable Department on a Monday through Friday basis, and 15 positions on a 5 day week other than Monday through Friday, 10 of them being Sunday through Thursday. Bureau says the General Chairman reviewed it and found it unacceptable.

Bureau asserts that in any event, the Record shows there was the give and take usually found in railroad conferences, and, because Bureau's original proposal was unacceptable to the General Chairman, it asked Mr. Donohue to return to Chicago for further conference the following day, August 17.

On arrival that morning, Mr. Donohue claims (by sworn statement) he, Messrs. Miller and Clark conferred in an effort to arrange a schedule for the 27 positions which would be acceptable to the General Chairman. They revised their original schedule.

When they had completed such a revised proposal, they said the General Chairman was in Conference with Mr. O'Connell in the latter's office, so they entered the office and the schedule was presented to the General Chairman, who objected and said it was still unacceptable.

Whereupon, Donohue's group withdrew and held another meeting to arrange a third schedule.

This third schedule prepared by the Donohue group, and it differed from the first one presented originally the day before by increasing the number of Monday through Friday assignments from 12 to 19, and reducing

the number of assignments other than Monday through Friday from 15 to 8—and included within the latter was a reduction of Sunday through Thursday assignments from 10 to 3,—including, by special reference, the two assignments here in dispute—was then presented to the General Chairman.

Quoting again from Mr. Donohue's sworn statement:

"After this schedule (referred to immediately above) was prepared we again returned to Mr. O'Connell's office and in the presence of Mr. Bell, Mr. N. J. Miller and myself, Mr. E. J. Clark handed Mr. O'Connell the third revised schedule. This was then given to Mr. Bell (the general chairman) for his review, and thereafter he made the very definite statement that 'you fellows finally came up with a work week schedule that is satisfactory'."

Mr. Donohue's sworn statement is corroborated in Sworn Statements by Messrs. O'Connell, Miller and Clark.

How does Organization refute this testimony? The General Chairman categorically denies the statements of Bureau in the case, and particularly the sworn statements of Messrs. Donhue, O'Connell, Miller and Clark.

We have here repeated much of the record in this case with respect to the preparation of the parties for the August 16 and 17 Conferences, particularly August 16 and preparatory days preceding it, because Organization, in addition to a categorical denial of Bureau's statements and affidavits, presents its defense thusly:

The General Chairman categorically denies that he ever had such an understanding (of agreement on schedules) or agreement with the Carrier (bureau). He states that before Carrier (bureau) officials Miller, Clark and Donohue entered Manager Piehl's office on August 17, 1949, where he was then in conference with the latter's assistant, Assistant Manager O'Connell on another matter, he had advised Assistant Manager O'Connell that all five day positions under Rule 28 would have to have Saturday and Sunday as "off days" or rest days as there provided; also that in such statement to Mr. O'Connell no exception was made thereto with respect to Positions 529 and 520 here involved. Mr. O'Connell does not, Organization asserts, categorically deny that General Chairman Bell made such statement to him.

Thus we have certain statements made by Bureau's representatives in sworn affidavit form, and "categorical denials" by the General Chairman.

We have here labored the record to repeat, from the record, certain details preceding and during the joint conferences of August 16 and 17 because of the great emphasis placed by Organization on the circumstances prevailing sometime during the day of August 17, when Bureau's Conference Committee entered Mr. O'Connell's office with what Bureau terms its third and final effort to resolve the other than Monday through Friday assignments problem, in which Organization emphasizes the phrase "where he (O'Connell) and the General Chairman were in conference on another matter."

Certainly this effort on Bureau's part to dispose of this matter was one of major importance to it. The record shows the two positions here in question had historically been scheduled on a Sunday through Friday basis, and less than a year before this instance, the subject of the same positions had been up for discussion between the parties.

The record includes a letter from F. A. Piehl, Manager to L. C. Bell, General Chairman, dated November 5, 1948, respecting a mutually agreed to change in the lunch periods of the two positions here in question; and such letter is countersigned by the Chairman, L. C. Bell, as accepted by him.

Organization refers to the line of communication between the parties in the matter as the "alleged verbal understanding or agreement asserted by the Carrier."

It quotes several Awards of this Division bearing on its contention throughout this Record, e. g:

"5057—. . . It is a fundamental rule of contract construction that alleged oral understandings cannot be permitted to vary the terms of a written document. . ."

"5059—The Board cannot agree with the Carrier's statement that 'the discussion and letter are the equivalent of a signed agreement.' "

"5931—In that situation all we can do is disregard the unsupported statements. . . The rule is that in the absence of other evidence the intent and purpose of action must be determined by its natural consequences and results."

In order, however, to answer the question we posed in the initial paragraph of this opinion, which the parties have agreed is the controlling point at issue, we must face the proven realities of this dispute, as follows:

1. The 2 positions in question had operated historically and by necessity on a Sunday through Friday assignment.

2. The parties, by reference, gave tacit recognition to existence of these two positions, as then constituted, by their mutually acknowledged letter of November 5, 1948 changing the lunch hours of the positions in question.

3. The National Wage Agreement establishing a Forty Hour Week in the industry, to be effective September 1, 1949, did not close the door on other than Monday through Friday assignments.

4. The General Chairman must certainly have been aware that the purpose for which joint meetings were scheduled with the Bureau for August 16 and 17 was to determine which, if any positions, would be agreed to as being exempt from the Monday through Friday scheduling.

5. The history of the collective bargaining relationship between Organization and Bureau at November 16 and 17, 1949 was not of sufficient duration to have permitted the proper recording of agreements or understandings between the parties that naturally ensues from a matured joint relationship of long standing.

6. While we have no purpose here of impugning the motives or the honesty of the parties to this dispute, we must conclude, from the evidence before us that the evidence in the record supports Bureau's contention that, as a result of the joint meetings of August 16 and 17, 1949, an understanding, or agreement, if you will, between the parties that Positions 529 and 520 would continue on a Sunday through Thursday assignment basis, has been accomplished.

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 Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

AWARD

Claim, (a), (b), (c), (d), and (e) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois, this 29th day of January, 1957.