

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**

UNION PACIFIC RAILROAD COMPANY (South Central District)

STATEMENT OF CLAIM: Claim of the General Committee that:

(1) Carrier violated rules of the Clerks' Agreement at Los Angeles, California, on November 12, 1953, when it required H. H. Johnson, Assistant Chief Clerk, and E. K. Kinnersley, Manifest Clerk, to suspend work on their regular assignment to absorb overtime that would otherwise have occurred to fill temporary vacancy of Day Yardmaster Clerk on Thursday, November 12, 1953.

(2) Johnson and Kinnersley be compensated an additional day's pay at the pro rata rates of their respective assigned positions for November 12, 1953.

EMPLOYES' STATEMENT OF FACTS: Included in the Yard Clerical force assignments, consisting of approximately 60 positions, at Los Angeles immediately prior to November 12, 1953, are the following:

H. H. Johnson, Asst. Ch. Clk. 8 A.M.-4 P.M. Rate \$347.93 per mo.

E. K. Kinnersley, Manifest Clk., 8 A.M.-4 P.M. Rate \$324.93 per mo.

J. A. Gallagher, Relief Clk. No. 1

J. A. Simmons, Relief Clk. No. 2

Effective November 12, 1953, Gallagher was granted sick leave. Simmons bid in and was assigned to Gallagher's Relief Clerical job No. 1. James A. O'Brien bid in and was assigned to Simmons' Relief Clerk job No. 2.

O'Brien was scheduled by Relief Clerk job No. 2 assignment to relieve the Day Yardmaster Clerk on Thursday, November 12, 1953. Carrier did not, however, permit O'Brien to fill his assignment contending that he was not qualified to do so at that time although they had awarded the vacancy to him.

In order to fill O'Brien's assignment that required him to fill the Day Yardmaster Clerk's job on November 12, 1953, Carrier arbitrarily moved Johnson off his job as Assistant Chief Clerk to work the Day Yardmaster Clerk's job. Then arbitrarily moved Mrs. Kinnersley off her regular job as

claim for additional compensation should be denied. Neither were the Claimants required to suspend work during their assigned hours.

All information and data contained in this Response to Notice of Ex Parte Submission are a matter of record or are known by the Organization.

(Exhibits not Reproduced).

OPINION OF BOARD: The facts in this case are not in dispute. While Organization bases its claim on an allegation that Carrier's action was violative of Rule 38(b), reading,

"Employees will not be required to suspend work during assigned hours to absorb overtime."

Carrier's defense is that Claimants were not required to suspend work to absorb overtime. Carrier asserts the instant claims were also denied "on the basis of an agreement reached between the parties on August 15, 1946, which provides that employes taken from their regularly assigned position to work another assignment will be paid for time lost on their regular assignment, less any time worked which extends into the hours of their regular assignment."

"The agreement reached between the parties on August 15, 1946," is Carrier's description of a letter of that date sent to J. R. Grayson, general chairman, Brotherhood of Railway Clerks (who is likewise concerned in the instant case) by E. J. Connors, Carrier's vice president, as an "agreed upon settlement" of 5 cases, 3 of which involved the "absorbing overtime rule."

In disposing of these 3 cases, Carrier agreed that the Claimant in each case would "be compensated for time lost on his regular assignment, less any time worked (in position to which assigned) which extended into the hours of his regular assignment."

Such letter was signed as "accepted" by General Chairman Grayson.

Early in 1947, Organization had two other cases of a like nature which it discussed with Carrier's representatives.

Carrier's F. C. Paulsen, in a letter to General Chairman Grayson dated January 20, 1947 stated:

"In discussing this claim with you a few days ago, you called my attention to an agreement dated August 15, 1946 between you and Vice President Connors, disposing of claim of R. J. Rasmussen ***, and you stated it was the position of the Brotherhood that the (instant) claim of Griffith and Stovall should be disposed of on the same basis. * * * I am agreeable to applying the above settlement to the instant claim. * * * The claim will be disposed of accordingly."

Carrier points to a similar claim which was handled in 1949. In a letter to General Chairman Grayson, Carrier's M. O. Willard stated "the performance is similar to that of the claims of R. J. Rasmussen * * * and J. C. Kortum * * * which were settled by letter agreement between yourself and Vice President Connors under date of August 15, 1946. * * * If this settlement (on basis of 8/15/46) is agreeable, please advise and I will place the claim in line for payment. * * *"

And General Chairman Grayson, in a letter dated July 8, 1949, informed Carrier that he was "agreeable to disposing of the claim on the basis outlined in your above referred to letter."

It is Carrier's position that in the instant case it paid Claimants Johnson and Kinnersley on the basis of what it terms the "August 15, 1946 agreement."

The Organization denies Management's contention and asserts "that settlement of these (1946, 1947 and 1949) individual time claims did not establish an agreed upon interpretation of the then existing Absorbing Overtime Rule of the 1945 General Rules Agreement. * * * There is nothing in the understanding had with Management disposing of these individual claims that would set aside the plain and unambiguous language of the Absorbing Overtime Rule 38 (b) of the February 1, 1952 Agreement."

Yet, Organization concedes "our Agreement of April 1, 1945 was in effect during this period (1946, 1947 and 1949) and the Absorbing Overtime Rule appearing therein is identical with that in the February, 1952 Agreement."

Carrier asserted that the rearrangement of personnel on November 12, 1953, from which the instant claim arose and which resulted in the reassignment of Claimants Johnson and Kinnersley, was done to avoid having to lay off J. A. O'Brien who admittedly had not then qualified for the vacant Day Yardmaster Clerk job. Organization asserts Carrier's explanation is "questionable," and adds that one J. A. Simmons, who was qualified, was off on his rest day "and could have been called but rather than do this the Carrier, in order to absorb overtime that they would otherwise have had to pay Simmons arbitrarily shifted the other clerks around as heretofore stated."

We must first, however, dispose of Carrier's contention that the August 15, 1946 letter from Carrier's Vice President Connors to General Chairman Grayson was "an agreement reached between the parties;" "that it is a fundamental right of the parties to an agreement to negotiate and arrive at an appropriate penalty for violations of the agreement."

It is argued on behalf of Organization that Carrier's position on this point "warrants little consideration. * * * These settlements dealt solely with the claims there involved."

Organization cites Award 5198 (Wenke) in part:

"When rules conflict with former practices, such practices are abrogated. If Carrier wanted an exception to this rule * * *, it should have provided for such an exception in the Agreement."

However, in 5198, Carrier relied on a past practice; where as in the instant case there is settlement of a case involving the same rule here involved: said "settlement" consisting of a letter covering details of settlement from Carrier to Organization, and signed as "accepted" by Organization's General Chairman. Further, Organization does not deny it subsequently used the formula established in the "letter agreement" of August 15, 1946 to affect identical settlements in two similar claims.

Organization, in addition to denying the letter of August 15, 1946 constituted an "agreed upon interpretation" of Rule 38 (b), calls the Board's attention to the fact that none of these so-called 'agreed to interpretations of the parties to the application of the Absorbing Overtime Rule' are carried forward nor do they appear in the printed current contract on file with your Honorable Board as do other Memorandums of Agreement upon interpretation of rules of the Brotherhood's contract with the Carrier."

In rebuttal to Organization's argument, Carrier asserts—and Organization offered no denial—as follows:

"There is no provision therein which provides that prior side agreements or interpretations were nullified or set aside unless included in the printed copy.

"On the contrary, it was the express understanding of the parties at the time of negotiating and executing the Agreement of February 1, 1952 that it would not have that effect. This precise question was raised during the negotiations at an Agreement Revision Conference held at 10:00 A. M. January 21, 1952, at which the Brotherhood of Railway Clerks was represented by K. T. Salyards, J. R. Grayson, J. R. Rosborough, S. B. Eoff, W. R. Wade, J. Hall and Leo Walker. In that conference it was agreed that all side agreements between the parties under the prior agreement would continue to be valid until terminated, regardless of whether or not they were among those selected to be placed in the back of the printed book."

Carrier cites Award 3551 (Carter):

"* * * The record discloses that similar claims have been made to this Carrier over a period of time in which the Organization claimed, and the Carrier paid, on the basis herein announced. This mutual construction of the Agreement by the parties themselves affords convincing proof as to what the parties intended the rule to mean.
* * *"

Accordingly we must conclude the weight of the evidence here is conclusive that the parties, by the letter of August 15, 1946, reached a mutual understanding as to how claims should be handled and compensation paid under Rule 38 (b).

Organization's claim here before us that Carrier's action of November 12, 1953, when it required Claimants Johnson and Kimmersley "to suspend work on their regular assignments," was violative of Rule 38 (b) must be upheld.

Despite Carrier's defense that Claimants here involved were compensated for the service performed on November 12, 1953 in accordance with Rule 25, and that Claimants were not required to suspend work to absorb overtime, we must hold that Carrier's strong reliance on the "letter agreement of August 15, 1946," is an admission of a violation of Rule 38 (b) for that "letter agreement" reads in part as follows:

"1. Claim of R. J. Rasmussen * * * for payment at pro rata rate of pay for hours of his regular assignment, and punitive rate of pay for period he was required to fill assignment of head yard clerk, Sept. 27th to Oct. 6th, 1945, on basis of violation of Rule 38 (b) of current agreement. (Emphasis ours.)

The same language, "on basis of violation of Rule 38 (b) of current agreement," was used by Carrier's Vice President E. J. Connors in describing the second claim (Kortum) covered by that same letter.

We, therefore, must and do conclude that a sustaining Award is in order with respect to part (1) of the instant claim, and a denial Award is in order with respect to part (2) of the claim because Carrier has shown that it compensated Claimants on the basis of the August 15, 1946 "letter agreement" which we have here held to be "a mutual understanding as to how claims should be handled and compensation paid under Rule 38 (b)."

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.

AWARD

Claim (1) sustained; Claim (2) denied in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: A. Ivan Tummon
Executive Secretary

Dated at Chicago, Illinois this 13th day of June, 1957.