Award No. 12288
Docket No. CL-12008

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Joseph S. Kane, Referee

PARTIES TO DISPUTE:

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

THE PENNSYLVANIA RAILROAD COMPANY

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

(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 4-A-2(c), Dining Car Department seniority districts by failing to pay Clerk H. A. Mastantuono and all others affected at the rate of time and one-half for Tuesday, September 7, 1954.

(b) Clerk H. A. Mastantuono and all others affected be paid at the rate of time and one-half for Tuesday, September 7, 1954 [Docket 19]

EMPLOYES' STATEMENT OF FACTS: This dispute is between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes as the representative of the class or craft of employes in which the Claimants in this case held position and the Pennsylvania Railroad Company — hereinafter referred to as the Brotherhood and the Carrier, respectively.

There is in effect a Rules Agreement, effective May 1, 1942, except as amended, covering Clerical, Other Office, Station and Storehouse Employes between the Carrier and this Brotherhood which the Carrier has filed with the National Mediation Board in accordance with Section 5, Third (e), of the Railway Labor Act, and also with the National Railroad Adjustment Board. This Rules Agreement will be considered a part of this Statement of Facts. Various Rules thereof may be referred to herein from time to time without quoting in full.

The named claimant as well as the others affected in this case are the incumbents of various positions in the Dining Car Department seniority districts, a System General Office department on this carrier. As such they have seniority standing in those seniority districts. The days of rest of their positions are all Sunday and Monday. The claimants observed Sunday, Septem-

The Carrier demands strict proof by competent evidence of all facts relied upon by the Claimant, with the right to test the same by cross-examination, the right to produce competent evidence in its own behalf at a proper trial of this matter and the establishment of a proper record of all of the same.

(Exhibits not reproduced.)

OPINION OF BOARD: The named Claimant, as well as those designated as "all others affected," occupy positions in the Dining Car Department of this Carrier. The rest days of their positions are all Sunday and Monday. The Claimants observed Sunday, September 5, 1954 and Monday, September 6, 1954, as their rest days. Monday, September 6, 1954 was also Labor Day, one of the seven recognized holidays. All the Claimants performed service on Tuesday, September 7, 1954, to the extent of a day or eight hours. The Claimants seek an additional day's pay at time and one-half rate of pay in addition to the day at straight time for Tuesday, September 7, 1954 in accordance with the provisions of Rule 4-A-2 (c). The claim was discussed with the Carrier December 14, 1955, and a letter was sent to the Organizations on January 5, 1956 stating in part:

> "In accordance with understanding reached during discussion of this subject, this case has been removed from the docket and will be held in abeyance, pending decision of the Third Division, NRAB, in similar cases involving the application of Rule 4-A-2 (c) with respect to the National Non-Operating Employes' Agreement of August 21, 1954.
>
> Following the decisions in such similar cases now before the Board, the instant case may be given further consideration."

After an exchange of letters between the Carrier and Organization it was agreed to hold the present case as well as numerous other pending cases until an Award was received from the Third Division, NRAB. Subsequently, this Award 8541 was issued November 26, 1958 which sustained the claim, that Claimants are entitled to the difference between the straight time paid and time and one-half for the work performed on September 7, 1954. The Claimants now seek to have all employes who performed the required service on September 7, 1954 paid according to the Award. However, the Carrier refused such a proposal and agreed to pay only those individuals for whom claims were properly filed under Rules 4-A-2 (c) and 7-B-1.

It was the Claimants contention that since in each claim filed an individual was named, there was also included the phrase, "and all others similarly affected". Therefore, the name of any individuals was merely used as an example to cover all employes who worked, on the indicated dates, in circumstances similar to those named. Thus to make full and proper adjustment all employes who may be entitled thereto by reason of their being in the same classification as named Claimants should be compensated.

The Carrier contended that Award 8541 applied to named Claimants only and that the phrase "all others affected", did not constitute Claimants within the meaning of Rule 7-B-1. Furthermore, Rule 7-B-1 (a) does not comprehend blanket claims for parties unknown, the rule clearly stating that, "claims for compensation alleged to be due may be made only by an employe or by the duly accredited representative as that term is defined in the agreement on his behalf.

The question to be decided is: Should all of the Claimants, those named and "all others affected", be compensated in accordance with the findings of fact and Award, in Award 8541 for Tuesday, September 7, 1954?

An examination of the record reveals that an agreement was entered into between the parties to hold the claims in abeyance pending receipt of a decision covering one of such claims progressed to the National Railroad Adjustment Board. The record states, ". . . A few, as in the present claim, contained the additional language 'all others affected', or some similar term. . . ." This expression in the Carrier's statement in the record, coupled, first with the joint statement of fact wherein under "Subject: Claim for in behalf of Clerk H. A. Mastantuono, and 'all others affected.' . . ." Second Award 8541, a claim of the System Committee of the Brotherhood against the same Carrier as here in issue states:

> "(a) The Carrier violated the Rules Agreement, effective May 1, 1942, except as amended, particularly Rule 4-A-2(c), and Article II, Section 1 2(a), and 5 of the Agreement of August 21, 1954, by failing to pay an additional day's pay at time and one-half for service performed on Tuesday, September 7, 1954, by various employes at various locations, Lake Division." (Emphasis ours.)

At no time prior to the issuance of Award 8541 was any question raised as to the claims in dispute not applying to unnamed Claimants, or the application of 7-B-1. It appears from the record that prior to the issuance of Award 8541 the parties were concerned only with those Dining Car employes under the Clerks Agreement holding regular positions, whose second rest day coincided with the Labor Day Holiday and who performed service on the day following the Holiday September 7, 1954. The question at that time was: Did Rule 4-A-2 (c) apply to those employes?

An expression in the record from the Carrier to the Organization in the form of a letter states:

> "Following the decisions in such similar cases now before the Board, the instant case may be given further consideration."

It has been argued by the Carrier that this expression in the correspondence clearly indicated that the Carrier did not agree to pay any claims after Award 8541 was rendered but just to give them further consideration. However, a practical application must be given to the above sentence. If a denial Award was rendered in No. 8541 the consideration would be, "the case is closed. The Board has decided that Rule 4-A-2 (c) does not apply to this situation." It was also practical for the Organization to be of the opinion that a sustaining Award would be an adjudicated wage claim and all employes who were in the class concerned would be paid. It further appears that the purpose of the Railway Labor Act is to resolve disputes by the use of Awards of the Board and not to discuss them further and leave the parties where they were prior to the Board's Award.

The Carrier also raises the question that the phrase "all others affected" is so broad and indefinite that the Claimants cannot be readily ascertained. The Organization replys to this contention by stating: (1) There is but one day involved, Tuesday, September 7, 1954, (2) The names of the employes of the Dining Car Department are a matter of record, (3) The amount to be paid is definite under Award 8541, (4) One payroll office administers the work for this Department, (5) The number of employes in this Department

are known. Thus no extensive search of the records is necessary. In reply to the Carrier's argument that it could not raise defenses to the claims because of their indefinite nature the following is offered. The entire issue has been decided in Award 8541 and is res judicata. No defenses are available.

The question now raised is: What was the purpose of the agreement?

The Organization's answer is, to withhold claims until the matter of the application of Rule 4-A-2 (c) was adjudicated and be bound by its results, rather than spend time on numerous repetitious claims. No evidence presents itself in the record to show that the Carrier objected to the agreement or to the expression "all others affected", until Award 8541 was issued, which sustained the claim. We are of the opinion that the Award gave the employes in this Class a right to the wages rather than a claim. Employes who completed the requirements of Rule 4-A-2 (c) in later years were paid these wages without the necessity of a claim based on this award. Why shouldn't the employes in 1954 receive the same wages for the same work? Was the Carrier trying to bind the Organization by the Agreement and not be bound itself? A denying award would have freed the Carrier from paying claims to those who had filed and those described as "all others affected". What benefit did the Organization receive from the Agreement, under the contentions of the Carrier? That the filed claims would be paid. They were payable regardless under the Award. The entire consideration for the Organization withholding the claims was that all employes in the class would be paid. In support of this contention we offer the fact that the phrase "all others affected", had been used on claims in this dispute and never objected to until Award 8541 was issued as a sustaining award.

We are also of the opinion that the Claimants identified as, "all others affected", are readily identifiable. The Carrier should have no difficulty identifying the regular employes of the Dining Car Department who worked September 7, 1954 when the day prior was a holiday and their rest day. The amount payable is fixed and certain. The Carrier's only defense appears to be the trouble and expense incurred, in paying the holiday wages. It is needless to say that such a defense, is untenable in any tribunal, to an action for money owed.

Thus we are of the opinion that Rule 4-A-2 (c) was violated by failing to pay Clerk H. A. Mastantuono and the Dining Car Department employes who worked September 7, 1954 and are within the application of Award 8541. Further, we find that the rights accruing under Award 8541 are vested, the back pay being due and payable. The claim being resolved by this award no longer existed. Thus 7-B-1 does not apply.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

1. That Rule 4-A-2 (c) was violated.

2. That Award 8541 of this Division granted a back pay award to all employes, so described herein, regardless of whether a claim was filed or they were described as, "all others affected".

3. The wages due, in said Award 8541, are the difference between the straight time paid and time and one-half for the work performed on September 7, 1954 to the employes designated in paragraph 4 following.

4. That the regular assigned Employes of the Dining Car Department, under the Clerks' Agreement, who had rest days of September 5, and 6, 1954, (September 6, 1954 being Labor Day, a paid holiday) and worked September 7, 1954 will be compensated as provided for in paragraph 3 above.

5. That the back pay due in paragraph 3 above is a vested right for all employes recited in paragraph 4, and a determinable wage due and payable. That the said claim is, as a result of Award 8541, res judicata.

AWARD

Claim sustained according to the opinion and findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1964.

CARRIER MEMBERS' DISSENT TO AWARD 12288,
DOCKET CL-12008
(Referee Kane)

The Majority erroneously sustained this claim in favor of "all others affected" notwithstanding the specific provisions of Rule 7-B-1, which were timely invoked during the handling of the claim on the property.

The crucial point of error was an assumption which the Majority offered as an interpretation or "practical application" of the following statement made by Carrier when the present claim and others were held in abeyance on the property:

> "Following the decisions in such similar cases now before the Board, **the instant case may be given further consideration.**"
> (Emphasis ours.)

The Majority assumes the emphasized language was intended to foreclose either party from contesting the merits or procedural deficiencies of all claims held in abeyance. Had that been the intent, far more suitable language could have been employed. The Majority asserts:

> "It was also practical for the Organization to be of the opinion that a sustaining award would be an adjudicated wage claim and **all employes who were in the class concerned would be paid.**"
> (Emphasis ours.)

The record shows that in 1956, the Organization attempted to have Carrier agree to the disposition of other claims on the basis of the award which would be rendered by the Board in the initial case. The Organization proposed:

> "* * * [We] would appreciate your concurrence in holding them in abeyance pending the issuance of an award covering the above docket, **and then disposing of them on the basis of the Award in accordance with the claims as made.**" (Emphasis ours.)

The Carrier would not agree to this proposal and substituted instead, the language previously quoted above. Now, the Majority's decision assumes the original proposed language was accepted by the Carrier when our facts clearly refute this assumption.

There was other evidence to show the Organization did not give the Carrier's language — holding the claims in abeyance — the interpretation which the Majority has gratuitously bestowed on it.

In a letter dated December 1, 1958, the Organization made the following request of the Carrier in connection with the application of **Award 8541:** (R.,p.9)

> "Numerous other similar cases were held in abeyance by the General Chairman and by the various Division Chairmen at the regional level. We assume that you will now arrange to dispose of all of these cases on the basis of Award 8541 and advise all concerned as provided in Rule 7-B-1 (d). **However, we suggest that this settlement might be more easily placed into effect by Management if in lieu of using the record of pay claims pending, that all employes who performed the required service under Rule 4-A-2 (c) during the period September 7, 1954, to date, be compensated under the Award. This would be, of course, a more equitable manner of disposing of this situation.** * * *" (Emphasis ours.)

It is plain, the Organization advanced this alternative class payment method as "a more equitable manner of disposing of this situation." The Carrier flatly rejected the idea of having numerous Claimants coming in on the coattails of the original Claimants. Thus, as late as 1958, two years after Carrier had agreed to hold the claims in abeyance, the Organization advanced the "class payment" concept for the first time, only as a more "equitable manner" of disposing of the claim. It clearly was not their opinion **then or at any previous time** that a decision in **Award 8541** constituted an "adjudicated wage claim and all employes who were in the class concerned would be paid."

The Majority says:

> "What was the purpose of the Agreement?"
>
> "The Organization's answer is, to withhold claims until the matter of the application of Rule 4-A-1 (c) was adjudicated and be bound by its results, rather than spend time on numerous repetitious claims. **No evidence presents itself in the record to show that the Carrier objected to the agreement or to the expression 'all others affected', until Award 8541 was issued, which sustained** the claim. We are of the opinion that the Award gave the employes in this Class a right to wages rather than a claim. * * *" (Emphasis ours.)

Obviously, the Carrier will not object to "the Agreement" when it devised the language which was then accepted by the Organization. On the other hand, the Carrier certainly objected to the Organization's grounds for holding the claims in abeyance and most strongly objected by introducing new language. It is clear the Majority failed to properly screen the record in this case and this accounts, in part, for the baseless conclusions reached.

The Majority says:

> "* * * The entire consideration for the Organization withholding the claims was that all employes in the class would be paid. * * *"

This conclusion is preposterous. The Majority had no way of reaching this conclusion from a reasonable analysis of the record. It is directly contrary to the language adopted by the parties when they agreed to hold the claim in abeyance. The Carrier's letter fixed the tenor of the Agreement. The Majority's conclusion implies that the contracting parties were not sufficiently competent to put down in writing the intent which the Majority so painstakingly presumed from a casual review of the record. If, instead of engaging in extracurricular presumptions, the Majority had made the valid assumption that the contracting parties possessed a fair degree of competency when they reached their letter Agreement of 1956, it is entirely conceivable the present claim would have been denied.

For the reasons cited and others too numerous to discuss, we dissent.

W. F. Euker
R. E. Black
R. A. DeRossett
G. L. Naylor
W. M. Roberts

LABOR MEMBER'S ANSWER TO CARRIER MEMBERS' DISSENT TO AWARD 12288, DOCKET CL-12008

Much argument could ensue over the first premise in the dissent, which, if taken at face value, would make the Dissenters seem wronged by this most proper Award. The fact of the matter is that objection to "all others affected" was not, as the first sentence would lead one to believe "timely invoked." It was raised after Award 8541 was rendered and after the claim had been held in abeyance for some two years.

Award 12288 is correct in every respect and by any standard. The fact that here the Carrier was unable to avoid, by hook or crook, payment of wages properly due its employes, brings forth a four page dissent is understandable, for too long and too often they have lately been allowed to escape their responsibilities.

Award 12288 is one of the best well reasoned Awards lately rendered by this Division. The Dissenters wailing does not detract one iota from the soundness thereof.

D. E. Watkins

4-20-64