Award No. 14309
Docket No. CL-15220

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Harr, Referee

PARTIES TO DISPUTE:

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

THE DENVER UNION STOCK YARD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5690) that:

1. Carrier violated rules of the current Agreement with the Brotherhood of Railway Clerks on February 6, 13 and 20, 1964, when it changed the hours of various employes of the Denver Union Stock Yard Company and required them to work from 7:30 A. M. to 4:00 P. M., on these dates.

2. Messrs. Moore, Erlenborn, Stout, Bowles, Hirschfeld, Skala and Eaton, who are regularly assigned to hours from 8:30 A. M. to 5:00 P. M., shall now be paid an additional hour at time and one-half for time worked between 7:30 A. M. and 8:30 A. M. and an additional hour at pro rata rate for time between 4:00 P. M. and 5:00 P. M., to which they were assigned by bulletin and not permitted to work, for February 6, 13 and 20, 1964, and for every additional day that their hours are so changed.

3. Messrs. Conner, Kastilec and Barrientos, who are regularly assigned to hours from 8:00 A. M. to 4:30 P. M., shall now be paid an additional one-half hour at time and one-half for time worked between 7:30 A. M. and 8:00 A. M., and an additional one-half hour at pro rata rate for time between 4:00 P. M. and 4:30 P. M., to which they were assigned by bulletin and not permitted to work, for February 6, 13 and 20, 1964, and for all additional dates when they are required to work outside of their regular assignments.

EMPLOYES' STATEMENT OF FACTS: Effective Thursday, February 6, 1964, and continuing each Thursday thereafter, the above named claimants have been instructed to report for duty at 7:30 A. M., one-half to one hour before the starting time of their regular assignments and have been released at 4:00 P. M., one-half hour to one hour before the end of their regular assignments.

Claimants have been paid eight hours at straight time rate for work performed on these days.

Attached as Employes' Exhibits Nos. 1 through 8 are copies of correspondence in connection with this claim which was handled up to the President and General Manager of the Stock Yard Company.

(Exhibits not reproduced).

CARRIER'S STATEMENT OF FACTS: The Denver Union Stock Yard Company owns and operates a large livestock market serving the principal producing areas of the intermountain West. More than one hundred acres of land and a substantial investment in pens, scales, loading chutes and other specialized livestock marketing facilities are used exclusively for the sale and handling of livestock. **The Company does not own or sell the livestock consigned to the market.** It provides only the facilities for the sale of livestock and the personnel required to receive consignments, delivers them to the market agencies who actually sell the livestock, and delivers livestock to the eventual buyer.

The Company was first declared to be a common carrier so far as its **loading and unloading of livestock by rail** in Ex Parte 127, decided on April 7, 1941, and reported in 241 ICC at page 241. Since that time, there have been many changes in the movement of livestock and in 1964 only 4.1% of total yard personnel hours was required to handle railroad business.

The operation of a stock yard in interstate commerce, such as Denver, is regulated by the provisions of the **Packers & Stockyards Act** of 1921, as amended; and by the numerous regulations of the Secretary of Agriculture promulgated under the provisions of the Act. The intent of these regulations is to define the responsibilities of the stock yard companies, the market agencies, and other market interests in the sale of livestock to the end that the legitimate interests of the consignor (who is frequently not present when his livestock are sold) are protected. This separation of responsibility between the Yard Company and the market agencies has been recognized by law since 1921 and, in fact, by the markets themselves for almost one hundred years.

The Company, consistent with the provisions of the Packers & Stockyard Act, holds itself out to perform certain services incident to the handling of livestock and these services are set forth under Section 201.17(b) in the definition of "yardage." The market agency, completely independent of the Stock Yard Company, as the sole agent of the consignor in effecting the sale of livestock, is directly responsible to his principal to select the method of sale which, in his opinion, best serves the interest of his consignor.

Since the effective sale of livestock depends on maintaining orderly marketing hours and practices, these independent market agencies, through the Denver Livestock Exchange, establish the hours of trading and practices at the Denver market. **Hours of trading,** for example, are dependent on the time available in the daylight hours for the proper preparation of the livestock for sale, the availability of buyers, and the effect of market activities at other markets who operate on different schedules. Accordingly, the Denver Livestock Exchange has, from time to time, changed the market hours consistent with the change in season and the effect on the overall marketing pattern of a change to Daylight Saving time at other markets. Recognizing this prerogative of the Exchange, the Company has always acceded to the requests of the Exchange to change marketing hours.

OPINION OF BOARD: Effective Thursday, February 6, 1964, and continuing each Thursday until September 1, 1964, the named Claimants were instructed to report for duty at 7:30 A. M. This was one-half to one hour before the starting time of their regular assignments. Claimants were released at 4:00 P. M. on these days and were paid eight hours at straight time rate for the work performed.

Claimants ask that they be paid at the time and one-half rate for the time worked before their assigned starting time and at the prorata rate for the time after 4:00 P. M. till the end of their regular assignment.

Employes rely on Rules 10, 15, 21(j) and 21(g) to support their position.

The Carrier contends that its actions were taken in accordance with Rule 15, reading:

> "Regular assignments for regular employes shall have a fixed starting time which shall be the same each day and shall not be changed without at least sixteen (16) hours' advance notice to the employes affected.
>
> When the established starting time of a position is changed more than one (1) hour for five (5) consecutive days, employes affected may, within five (5) days thereafter, exercise their seniority rights to another position. Changes of starting time brought about by action of the Exchange in changing market hours or by changes forced by daylight saving will not be considered as a change in established starting times.
>
> Positions covered by these rules will not have a starting time between the hours of twelve (12) midnight and six (6:00 A. M.)."

We believe that the language of the exception, contained in paragraph two of the rule, is clear and unambiguous. If the change in starting time is brought about by action of the Exchange in changing market hours then we cannot consider this as a change. Where the rule is clear this Board will not attempt to interpret further its meaning. Under this exception to the rule it is as if the change never occurred.

From a review of the record we find no dispute concerning the reason for the change in starting time. In his letter of March 11, 1964 (R-13) Mr. Purcell stated:

> "The Denver Livestock Exchange requested the Company to make provisions to begin the sheep auction on Thursday only at 7:30 A. M., beginning February 6, 1964. In their letter of request, the Exchange pointed out that sheep receipts are at a seasonal low, and the services of their auctioneer are required at the cattle auction, which begins at 9:00 A. M. on Thursday."

This was repeated at R-16, R-19, and R-21.

Mr. Crew, President and General Manager, stated in his letter of July 9, 1964:

> "The rule is quite clear that this provides — and was intended to provide — for a change that might be brought about by the Exchange, and was written to exempt the Company from having to pay penalty overtime in such instances. The rule has been in effect for twenty years, and has never been questioned as to the right — when called upon by the Exchange — to open the market earlier without penalty."

We find no reason to consider other rules of the Agreement in disposing of this claim.

We will deny the claim.

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

That the Agreement has not been violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 7th day of April 1966.

LABOR MEMBER'S DISSENT TO AWARD 14309, DOCKET CL-15220

Award 14309, Docket CL-15220, is in serious and harmful error and contrary to one of the basic concepts of contract construction.

All rules of an Agreement are supposed to be harmonized so that they do not contradict each other. Here the Referee, by accepting Carrier's bare assertions, allows a specific exception to a specific rule to be expanded so as to apply also to Rules 21(g) and 21(j) reading:

> "Rule 21(g) — (1) Except as otherwise provided in (g) (2), time in excess of eight hours shall be paid for at time and one-half on the minute basis on any day worked. No overtime will be worked or paid for except by direction of proper authority. Employes will punch in and out on their own time."

> "Rule 21(j) — Employes will not be required or permitted to suspend work during regular hours to absorb overtime."

Now the clarity of those Rules is certainly equal to the language of Rule 15 quoted in the Award and, notwithstanding that 21(g) contains only one exception, the Referee has here construed the Agreement so as to add another exception thereto. Such violates another basic concept of contract interpretation.

While more could be said there is sufficient evidence in the Award, without even referring to the record, that amply supports the fact that the Award is in error. Obviously if the starting time was not "changed" Claimants were due the payment requested "for time worked before their assigned starting time" and for the time they were suspended from work during their regular assigned hours.

I therefore dissent to this erroneous Award.

D. E. Watkins,
D. E. Watkins, Labor Member
5-6-66

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