

Award No. 14311

Docket No. CL-15194

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Don Harr, Referee

PARTIES TO DISPUTE:

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

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-5652) that:

(a) The Carrier violated the agreement and contract of employment when, effective January 1, 1964, without notice conference, or agreement it amended the Employees Pension Plan by excluding positions covered by the agreement previously included therein by Agreement.

(b) The Carrier shall restore the working conditions previously in effect with respect to Employees Pensions and shall make whole with respect thereto employees:

Donald W. Marion
Della J. Summers
Rosemary McDermott
Audrey Whittet
J. G. Gillespie, Jr.
H. B. Sowards
L. S. Adams
R. R. Chapman
Norma Alltop
Jeannine Bryan
P. V. Southworth
E. R. Rowsey
B. W. Swartz
Estal Norton
L. Jack Rhoads
D. R. Bias
A. E. Emerick
H. J. White
I. N. Shaver
A. C. Doersam

E. C. Adams
J. V. Stephenson
E. B. Kincaid
J. M. Elliott
John S. Day
William L. Wuest
William W. Lee
Carl D. Stinnett
George W. Lokie
Herman L. Unclebach
Robert J. Houser
Roy H. Meinhart
Carl W. Cantrell
Robert E. Hardman
Benjamin H. Hocker
William T. Baker
Orville W. Franklin
Betty B. Witherington
John K. Layne

and all other employees covered by the Clerks' Agreement who now or may hereafter occupy positions agreed to be paid on a monthly basis

for the specific purpose of including the incumbents in the Employees Pension Plan.

EMPLOYEES' STATEMENT OF FACTS: 1. Effective January 1, 1945 the parties adopted agreement No. 7, Rule 1 (k) of which reads as follows:

"Positions excepted from any of the rules of this Agreement are listed in Memorandum Agreement No. 1."

Memorandum Agreement No. 1 reads as follows:

"Memorandum Agreement No. 1
Supplementary To General Agreement No. 7
Effective January 1, 1945

(a) The immediate personal office force of the following officers is excepted from all the rules of Agreement No. 7, except:

Rules 1, Sections (a), (b), (g), (k), (l), (m), (n), (p);
3 (j); 10; 14; 16; 26 (i), (k); 51; 52; 53; 60; 62; 64 and 65.

[Office, name of incumbent officer and location
omitted]

(b) Positions listed in the following offices are excepted from Rules 3(b); 4; 18(b), 29; 34 and 39.

[Office, name of incumbent officer, location, and list of
positions omitted]

Rule 24, Sections (b), (c), and (d), do not apply in going from one excepted position to another."

As this dispute is principally concerned with positions listed in Section (b) of Memorandum Agreement No. 1, we here give the title or subject matter of the rules from which those positions were excepted: Rule 3(b) deals with the establishment of seniority; Rule 4 is titled "Promotion, Assignments, and Displacements" and provides that fitness and ability being sufficient seniority shall prevail; Rule 18(b) deals with the exercise of seniority when forces are reduced or positions abolished. Rule 29, as then constituted, was titled "Hours of Service -- Overtime -- Meal Period." Rule 34 was the "notified or called" rule, and dealt with minimum payments for overtime before or after assigned hours and on holidays and Sundays. Rule 39, titled "Sunday and Holiday Work," provided that work performed on Sundays and the specified holidays would be paid for at the rate of time and one-half. Rule 24 has to do with holding an employe on his former position after he has been assigned another, or when rearranged to a position other than his own.

Therefore, the incumbents of the positions covered by both Sections "a" and "b" of Memorandum Agreement No. 1 were not subject to the hours of service and overtime provisions of the working agreement. Instead, they were paid a monthly rate to cover all services performed, as contrasted with the daily rate paid "rank-and-file" (fully covered) employes for an eight hour day or less with overtime for work required before and after assigned hours and on Sundays and holidays. (Some employes, "Necessary to the continuous operation of the Carrier," had rest days other than Sunday. That fact, however, has no particular bearing on the central issue).

Many positions had been traditionally paid on a monthly basis; despite this rule and although no specific agreement was made to cover, they continued to be paid on a monthly basis. The Clerks' organization took no exception to this.

On March 19, 1949, a certain group of Carriers, of which this Carrier was a party, represented by the Eastern, Western, and Southeastern Carriers' Conference Committee, entered into a collective bargaining agreement with sixteen cooperating non-operating railway labor organizations, of which the Brotherhood of Railway Clerks was a party, represented by the Employees' National Conference Committee. This agreement, which provided, among other things, for a wage increase and a shorter work week, is generally known as the "Forty-Hour Week Agreement."

With the execution of the aforesaid agreement and the coming of the 40-hour week coupled with a concurrent general wage increase based on cents per hour, the General Chairman of the Clerks' organization for this Carrier proposed, and the Carrier agreed, to amend Rule 43(a) to read as follows:

"Positions in Group 1 and Group 2 heretofore paid on a monthly, daily, or any other basis shall be paid on a daily basis, except such monthly rates as may be mutually agreed to between the Management and General Chairman on or subsequent to September 1, 1949."

The aforesaid agreement was executed on July 25, 1949, to become effective September 1, 1949. The General Chairman of the Clerks' organization took the position that as of September 1, 1949, all positions should be paid on a daily basis unless otherwise specifically agreed to in each individual case. During this same period, negotiations continued between the Carrier and the Clerks' organization in an effort to reach an agreement on the amount and basis of pay for many positions. These negotiations culminated with the execution of the agreement of August 8, 1950 (to be effective September 1, 1949) which has been identified as Carrier's Exhibit 11. Pending the execution of this agreement, however, the Carrier continued to pay on a monthly basis those positions formerly paid on a monthly basis with the specific purpose of not depriving the incumbent employees of any benefits they might derive or enjoy from such method of payment, one of which was continued membership for those who were members of the pension plan.

A careful examination of the August 8, 1950, agreement (See Carrier's Exhibit 11) will unquestionably reveal that neither pensions nor the pension plan is the subject matter thereof. No possible interpretation could construe the agreement—which is in plain, unambiguous language—to cover the pension plan. All other subsequent agreements referred to by the General Chairman of the Clerks' organization in connection with this claim are equally silent as to pensions or pension plan coverage.

(Exhibits not reproduced.)

OPINION OF BOARD: In 1946, Carrier adopted an unfunded, non-contributory Pension Plan for employees who qualified under its terms. Carrier contends that during its 19 years of existence the plan has never been, and is not now, the subject of any collectively bargained agreement. Carrier states that it expressly reserved the right to control, terminate, modify or amend the plan unilaterally.

During its existence the plan has been amended on several occasions. A part of the amendment to the plan made January 1, 1964, precipitated the claim now before this Board. The amendment provided:

"Notwithstanding the foregoing, no person shall become a member of the Plan on or after January 1, 1964, if his position is under the scope of a labor contract."

This amendment limited coverage of the plan, but preserved membership for employees then under the plan.

The Employees contend that the Agreement dated August 8, 1950 (effective September 1, 1949) (R-17) was for the primary purpose of permitting incumbents of certain positions to participate in the Pension Plan.

The Employees allege that Carrier violated the agreement and contract of employment when it amended the plan without negotiation. There is not now or never has been a rule in the agreement covering the Pension Plan. It apparently has been the subject of negotiation on several occasions.

The Employees have not been deprived of any contractual right by the Carrier's action. We are of the opinion that this Board lacks jurisdiction to decide the instant claim. Since the Pension Plan is not a part of any agreement between the parties this Board cannot consider past practice to create a contractual obligation when none existed in the agreement.

We will dismiss the claim.

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 does not have jurisdiction over the dispute involved herein; and

That this Board lacks jurisdiction to decide the claim.

AWARD

Claim dismissed.

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.