Award Number 288
Docket Number CL–250

NATIONAL RAILROAD ADJUSTMENT BOARD

Third Division

Willard E. Hotchkiss, Referee

PARTIES TO DISPUTE:

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

NEW YORK, CHICAGO AND ST. LOUIS RAILWAY COMPANY

DISPUTE.—

"Claim of C. A. Michael, Yard Clerk, at Toledo, Ohio, for payment in accordance with Rule 31 of Clerks' Agreement for time worked on Sundays and Holidays from March 5th to June 18th, 1933, as per detailed statement attached hereto as Exhibit 'A' and made a part hereof."

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

The carrier and the employee involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

As a result of a deadlock, Willard E. Hotchkiss was called in as Referee to sit with the Division as a member thereof.

An agreement exists between the parties, bearing effective date of February 1, 1931. Petitioners cite the following rules of their agreement:

"RULE 30. *Overtime.*—Except as otherwise provided in these rules, time worked by daily or hourly rated employees in excess of eight (8) hours, exclusive of meal period, on any day, will be considered overtime and paid on the actual minute basis, at the pro-rata rates for the ninth hour and at time and one-half thereafter."

"RULE 31. *Notified or Called.*—

"(a) Except as provided in paragraph (b), employees notified or called to perform work not continuous with the regular work period or on Sunday and specified holidays shall be allowed a minimum of three (3) hours for two (2) hours' work or less and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis.

"(b) Employees who have completed their work period for the day and have been released from duty required to return for further service, may, if conditions justify, be paid as if on continuous duty.

"(c) Work performed by employees covered by Rule 30 on Sunday and the following legal holidays, namely: New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day, and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation, or by proclamation shall be considered the holiday), shall be paid at the rate of time and one-half when the entire number of hours constituting the regular week-day assignment are worked, except that employees necessary to the continuous operation of the carrier and who are regularly assigned to such service will be assigned one (1) regular day off duty in seven (7) Sunday if possible, and if required to work on such regularly assigned seventh day off duty will be paid at the rate of time and one-half; when such assigned day off duty is not Sunday, work on Sunday will be paid for at straight time rate.

"(d) Except as otherwise provided in these rules employees covered by Rule 30 when assigned, notified, or called to work on Sundays and/or the above specified holidays, a less number of hours than constitutes a day's work within the limit of the regular week-day assignment shall be paid a minimum allowance of three (3) hours at pro-rata rate for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis."

Carrier cites the above quoted rules and, in addition, Rule 42, reading:

"RULE 42. *Rates of Pay.*—It is understood and agreed that the adoption of the foregoing rules will not operate to change any rates of pay now in effect for any positions covered by these rules and that any subsequent adjustments of rates will be from the present rates as a basis."

Following is the preamble of special agreement effective February 20, 1933, which gave rise to this claim:

"Agreement between the New York, Chicago, and St. Louis Railroad Company and employees of The New York, Chicago, and St. Louis Railroad Company; The Chesapeake and Ohio Railway Company, Hocking Division; and the Pere Marquette Railway Company represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees relative to consolidation of clerical forces in the office of the general agent at Toledo, Ohio."

Sections 1, 2, and 3 of this special agreement specify how seniority rights as between employees of the three railroads shall be applied in the joint Agency. Sections 4, 5, and 6 read as follows:

"(4) Where it is desired to readjust rates, conference as to rates will be held with Brotherhood Nickel Plate System Board Representatives, as it is understood that the NKP Clover Leaf Clerks' Agreement governs, and that all employees in the joint agency come under the rules of the NKP Agreement.

"(5) Employees brought into the Nickel Plate Joint agency from the Chesapeake and Ohio and Pere Marquette offices shall not be displaced by NKP clerks, other than joint agency clerks, for a period of one year. After this time limit of one year expires, rules of Nickel Plate Road Agreement will apply.

"(6) This memorandum of agreement shall not be considered as a precedent in establishing other joint agencies or consolidations."

Following is the position of petitioners quoted in full from original submission:

"*Position of Employes.*—As outlined above in statement of facts, Mr. Michael was assigned to position in question by bulletin February 20, 1933, and between the dates named in the statement of claim performed services on Sundays and Holidays as detailed in Exhibit 'A' attached hereto.

"The carrier has based its failure and refusal to compensate Mr. Michael for his Sunday and Holiday work in addition to his basic rate of pay, on the grounds that he was receiving a monthly rate of pay to compensate him for all services rendered.

"Employes contend that the arbitrary establishment by the Carrier of a monthly rate of pay on this position is not in accord with rules of agreement and cannot serve to define the application of any of the rules in the agreement to the position or to employes involved in this claim. Employes' representatives on this property have not agreed to any monthly rated positions that would compensate the incumbents of such positions for all services rendered.

"Employes further submit that in view of the fact such monthly rated positions are excepted from certain rules of the agreement, it must consistently follow that such monthly rates of pay must be mutually agreed to by and between the parties to the agreement of February 1, 1931. Employes have never been requested nor have they agreed to except the position involved in this claim either from the scope of the agreement or from the application of any rules contained therein.

"Since the establishment of the Joint Agency at Toledo, Ohio, and since the assignment of the position in question to Mr. Michael on the bulletin

of February 20th, 1933, this position in question became vacant and was bulletined on August 5, 1935, as a temporary vacancy. Bulletin No. 1, of August 5, 1935, issued by the Carrier, reads as follows:

"'Position of Erie Street Yard Clerk is temporarily vacant. Hours of assignment 8:30 A. M. to 5:30 P. M.—one hour for lunch. Working days, until further notice, daily, except Sunday and Holidays. Rate of Pay, $158.25 per month. No overtime position.

"'Bids will be accepted up to 5:00 P. M., August 10th, 1935.

A. W. SHEAHAN.'

"The Carrier while contending this is a monthly rated position including Sundays and Holiday service has failed and refused to agree to compensate this position on a monthly basis as monthly positions should be compensated, but insists deductions shall be made from the incumbent of the position when he is off duty, regardless of reasons. Such action on the part of the Carrier proves the position is not operated or compensated on a monthly basis.

"We submit that no justifiable distinction can be made by the carrier in the application of Rule 31, Paragraph C, and Rule 30 for service rendered by employes upon their regular eight hour assignment on week days, or on hours of service rendered on Sundays and Holidays."

POSITION OF CARRIER.—Following is position of Carrier quoted in full from original submission:

"Mr. C. A. Michael, who was a former C. & O. employee, exercised his seniority rights to the position of Erie Street Yard Clerk, rate $158.25 per month, which position had been previously and continued to be, under the jurisdiction of the Nickel Plate Railroad. In transferring from the C. & O. payrolls and schedule agreement this employee came under the same schedule provisions as other Nickel Plate employees of the Clover Leaf District, the rules and practices of the C. & O. having no bearing whatever upon his compensation status subsequent to March 1, 1933, this being a specific stipulation of the joint agreement referred to in the Statement of Facts. It is to be noted that no dispute exists as to his rate of pay.

"Rule 31, which is cited by the employee representative as the basis of this claim does not refer to monthly rated employees. A comparison of Rules 30 and 31 as finally adopted, with those which were requested, clearly substantiates the fact that monthly rated positions were exempt from their application, and such was the accepted practice prior to the institution of this claim. Rule 42 further substantiates the maintenance of the monthly rates which were in effect at the time the agreement was negotiated. This is further supported by the fact that subsequent to the signing of the agreement effective February 1, 1931, the General Chairman of the Clerks' organization did meet at his (the General Chairman's) request the General Superintendent in an effort to have him agree to convert monthly rates, this being evidenced by letters of September 4th, 10th, and 21st, 1931, exchanged between Mr. E. J. Dollard, General Chairman, and Mr. F. J. DeGrief, General Superintendent, copies of which are herewith attached as Exhibits "*A*", "*B*", *and* "*C*".

"It is therefore the position of the carrier that the claim is not supported by the rules, and that to concede the contention of the organization would have the effect of writing into the rules a provision which does not now exist.

"For the purpose of demonstrating the equity of our position with respect to the compensation for this position, we are giving below a history of the rate:

"The rate of the position of Erie Street Yard Clerk commencing October 1, 1923, was $120.00 per month. At that time three other yard clerks at M. C. Junction, Toledo, were being paid $4.77 per day or an average of $121.64 per month, excluding Sundays and Holidays.

"On September 16, 1924, the daily rated yard clerks at M. C. Junction were converted to a monthly rate of $150.00 which was paid for all service rendered, including Sundays and holidays. One of these positions is still maintained, the present rate being $158.25, the occupant working Sundays and Holidays, for which no additional compensation is allowed.

"On October 1, 1927, the rate of $120.00 for Erie Street Yard Clerk was increased to $150.00 to equalize wages with similar positions at Toledo, Ohio.

"On November 1, 1929, the rate of $150.00 was increased to $158.25 as result of an arbitration award, which rate is still in effect.

"To sustain the position of the organization in this case would have the effect of establishing a daily rate of $6.20¾ or far in excess of rates paid yard clerks both at Toledo and generally.

"If the rate of $4.77 per day for yard clerks at Toledo (M. C. Junction) had not been converted to monthly rate, the present daily rate would be $5.03¼, which would produce the following earnings for 306 days per annum:

$5.03¼ x 306 equals $1,539.95.

$1,539.95 divided by 12 equals $128.33 per month.

"In order to earn $158.25 on a daily rate of $5.03¼, it would be necessary for the Erie Street Yard Clerk to work on an average of 6.4 hours every Sunday and holiday throughout the year at time and one-half.

"The total hours worked by Mr. Michael on the Sundays and holidays during the period March 5th to June 18th, 1933 (17 days) was 63 hours and 15 minutes, or an average of approximately 3 hours and 45 minutes per day.

"Your conclusion in this case must be determined on the basis of schedule rules, Rule 31 being the only rule pertaining to compensation for Sunday and holiday service. Rule 31 refers to Rule 30 for a definition of the class of employees who shall receive time and one-half for Sunday and holiday work. Rule 30 specifically limits its application to 'daily or hourly rated employees'. Mr. Michael was not a daily or hourly rated employee.

"We contend that Mr. Michael has been properly and fairly compensated, and that this case can be considered only as an effort to secure greater remuneration for the same class of service, which we consider is not only inconsistent in connection with the understanding and agreement in connection with the joint agency, but contrary to the spirit of the schedule rules, and certainly not in keeping with the provisions of the Railway Labor Act with respect to procedure to be followed in changing rules or in adjusting wages.

"While it is true that the bulletin of February 20, 1933, did not state that Sunday and holiday service was required, neither did it state that such service would not be required, and but for the fact that an employee from another road was awarded the position, we doubt that this question would have been raised, for the reason in a small organization such as at Toledo the Nickel Plate employees were fully acquainted with the requirements of the positions. The fact that no question was raised prior to March 1, 1933, seems to bear out this assumption. However, while we do not feel that the omission from the bulletin of reference to Sunday and holiday service is a pertinent factor in determining proper application of the rule, the General Manager did, in conference with the General Chairman offer to pay the claim of Mr. Michael on the basis of alleged misunderstanding on his part when he bid in the position, provided it was definitely understood and agreed that in the future the position would be compensated as in the past. This offer was declined, which clearly evidences that the primary purpose of the petitioner in this case is to secure such a construction of Rule 31 as will absolutely nullify its present accepted meaning. Rule 31 requires no construction as it is thoroughly clear and supports the position taken by the company.

"We respectfully request that the claim be declined."

Preceding statement of position in original submission Carrier presented an extended Statement of Facts in which Rules 30 and 31 (c) are quoted in paralleled columns with the form of those rules which the Carrier states was requested by representatives of the employees.

The significant point of this comparison is that in Rule 30 the employees are represented as requesting the rule as it now stands with the phrase, "worked by daily or hourly employees", omitted. In respect to Rule 31 (c), employees are represented as requesting the rule with the phrase, "covered by Rule 30", omitted. There are other differences in phraseology indicated but they do not

appear to be pertinent. The following comment occurs opposite Rule 42: "Not requested by employees, but agreed upon in conference."

Other points worthy of note brought out in the Carrier's statement are:

1. There is no provision in the agreement that clerical employees shall be paid on a daily or hourly rate basis.

2. At the time the agreement was negotiated there were several monthly rated positions, among them that of Erie Street Yard Clerk, rate $158.25, and several such positions are still in effect.

3. In conferences leading up to special agreement on joint agency there was some disagreement as to rates of pay for certain positions but not for this one.

4. Inclusion of position now subject to dispute in the joint agency force was not originally contemplated, but it was agreed to place it on joint agency bulletin to provide additional protection to senior men who were disturbed.

5. The last significant statement is an outline of the handling of Michael's claim for extra Sunday and holiday pay through the System Board where it was deadlocked.

EXHIBITS.—Petitioners submit Exhibit "A", time worked Sunday and Holiday by C. A. Michael, March 5 to June 18, 1933, and Exhibit "B", Special Agreement concerning Joint Agency. Carrier submits Exhibit "A", letter of September 4, 1931, E. J. Dollard, General Chairman, to F. J. DeGrief, General Superintendent, requesting among other things conversion of monthly rated employees to daily basis; Exhibit "B", letter of September 10, 1931, Degrief to Dollard declining to convert rates requested; Exhibit "C", September 21, 1931, Dollard to DeGrief in which the following appears:

> "Regarding last paragraph of your letter, advising that you are not agreeable at this time to making any conversion in the rates of pay of the monthly rated positions, on Clover Leaf District, I am agreeable to letting this matter rest for the time being, as I would like to make a further study of these rates, etc. However, we must insist that the rules of our agreement apply to the positions listed on statement furnished me by Supt. Vorhis, under date of August 28th. I note that the statement furnished by Supt. Vorhis, under date of August 28th, is not complete and to be specific would call your attention to clerk to trainmaster at Madison, Ill. This position is not an excepted one and comes under clerks' agreement."

ARGUMENT BEFORE THE REFEREE.—For Petitioners:

Rule 31 (a) was quoted and the point was made that no exception was made therein to any employees except as provided in paragraph (b), which neither party claims is governing.

The Bulletin of Michael's position reads:

> "Erie Street Yard Clerk—$158.25—8 A. M. to 5 P. M."

with no reference to Sunday or holiday work. The argument then continues:

> "Had the Carrier wanted to secure Sunday and holiday work without overtime payments therefor, as it now says it can do, it would have been necessary to so state on the bulletin, and to have made such a condition of acceptance upon the part of Michael. We feel that, even had the bulletin so stated, the incumbent thereof would have a claim under Rule 31."

The fact that Carrier offered to pay Michael on the basis of alleged misunderstanding provided it was understood that subsequent to the offer the position would be compensated as it had been previous thereto, was cited as an indication that the Carrier felt morally bound.

A new agreement of January 1, 1936, was cited and the point was made that this was in effect when the case was argued before this Board, and that under the new agreement the Carrier would be obliged to pay Michael as claimed in the instant case.

Petitioners' contention in respect to what was claimed to be the arbitrary establishment of monthly rated positions was reiterated.

FOR CARRIER.—The argument was made that this Division is not authorized to change a rate of pay.

It was pointed out that:

> "while petitioner in his original submission alleged that carrier had arbitrarily established some monthly rates, at oral hearing April 1st, General Chairman Dollard stated that monthly rate in question was a negotiated rate and emphasized this on two separate occasions."

The point was made that the position in dispute was one of a number of monthly rated positions on the Clover Leaf District at the time the February 1st, 1931, agreement was negotiated. It was stated that it had been on a monthly basis since October 1st, 1923.

The point was urged that there is in the agreement of February 1, 1931, no provision for conversion of monthly rated positions to daily basis such as is contained in the Nickel Plate agreement, which did not apply on the Clover Leaf District. Instead of this, it was pointed out the agreement contained Rule 42, above quoted, and also Rule 43, to wit:

> "RULE 43. *Duration.*—This agreement shall be in effect for one (1) year from effective date, and thereafter until thirty (30) days' notice in writing shall have been given by either party of a desire to change or terminate the same or any part thereof."

Further point was made that the position in dispute had been paid a monthly rate for eight years when the agreement of February 1, 1931, was negotiated and under the terms of that agreement could not be changed except by negotiations between the parties. The further point was made that paragraph 4 of the special agreement (quoted above) again had given complete recognition to the monthly rate and again provided that it could only be changed by negotiation.

The reference to Rule 30 in (c) and (d) of Rule 31 was cited, as was the phrase, "time worked by daily or hourly rated employes", in Rule 30. The import of these features was outlined as follows:

> "The parties in negotiating the agreement of February 1, 1931, were fully aware of the existence of this and other monthly rated positions, and it is clear that with this knowledge in mind they specifically provided that Rules 30 and 31 of that agreement would only be applicable to daily or hourly rated employees.
>
> "It is shown by the carrier's evidence, and undisputed by the employees, that occupants of this and other monthly rated positions have never been paid additionally for services performed on Sundays and Holidays, and matter of fact at this time there are three monthly rated positions at this same terminal which work regularly on Sundays and Holidays without additional compensation, and in connection with which no dispute exists."

The point was stressed that no dispute arose until the position was included in the joint agency and a former C. & O. employee who had been working under a daily method of pay was placed in the position and tried to have the principles governing his former position applied.

OPINION OF REFEREE.—For the most part the contentions of the parties are well covered in the above outline.

In the last page of petitioner's submission it is stated that the Carrier—

> "has failed and refused to agree to compensate this position on a monthly basis as monthly positions should be compensated, but insists deductions shall be made from the incumbent of the position when he is off duty, regardless of reasons."

If this is a fact, its bearing on the case would depend somewhat upon the exact circumstances under which deductions had been made during the period to which this dispute applies. The Referee is unable to find in the record any evidence on this point, nor is there indication that it was discussed at the hearing. In the absence of such information it is impossible to give great weight to the statement.

Reference has been made by the carrier's representative to a discrepancy between the petitioners' submission and the facts brought out at the hearing as to whether the rate of this position is an arbitrary rate imposed by the carrier or a negotiated rate. If the record did not cover this point, it would perhaps be necessary to reconcile the question of fact here involved. The Referee believes, however, that the record as it stands, and the arguments thereon, furnish an adequate basis for deciding the point at issue.

There is no reason to doubt that the existence of monthly rated positions, including the one now in dispute, was known to the representatives of the employees, both at the time the agreement of February 7, 1931, and at the time the special agreement effective February 20, 1933, were negotiated. If this is

true, and the Referee must conclude from the evidence that it is true, the language of the agreement effectively excludes the position from the operation of Rule 31 insofar as Rule 31 has to do with payment for Sundays and holidays. This fact being accepted, the rate in question then becomes subject to Rule 42, which means that the rate must remain in effect until changed by negotiation. References made in arguing the case indicate that a change in the status of the position has now been agreed to, but it does not appear that these subsequent changes applied to the earlier period which this claim covers.

Reference has been made to the circumstances that when this position was bulletined no mention was made of the fact that overtime would not be compensated. The bulletin should unquestionably have indicated this fact. However, the fact that the status of the position as to overtime was well known to old employees of the Clover Leaf District considerably minimizes the importance of the omission. The Referee believes that it was further minimized by the offer of the carrier to make good any loss the employees who had come over from the C. & O. had suffered as a result of his possible misunderstanding of the conditions. Subsequent to the time this offer was made and declined, Mr. Michael was fully advised as to the carrier's position, and to that extent any lack of information because of the incomplete statement in the bulletin was corrected.

The question then arises as to whether or not Mr. Michael has any grievance in equity for which a remedy should be provided in deciding this claim. Employees' Exhibit "A" indicates that Michael worked a total of 63 hours overtime during the period covered by this claim. Considering the monthly rate at which he was paid, the amount of overtime cannot be held to represent such an arbitrary or burdensome application of the agreement as herein interpreted, as to demand relief in equity. Also the Referee must conclude that if there had been any significant deductions during the period covered by the claim on account of the regular hours not worked, the record would have so shown. In the absence of evidence of unfair or burdensome application of the agreement, there is no occasion for redress on grounds of equity.

AWARD

Claim denied.

By Order of Third Division:

Attest:

NATIONAL RAILROAD ADJUSTMENT BOARD.

H. A. JOHNSON, *Secretary.*

Dated at Chicago, Illinois, this 13th day of August 1936.