Award No. 707
Docket No. TE-629

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

William H. Spencer, Referee

PARTIES TO DISPUTE:

THE ORDER OF RAILROAD TELEGRAPHERS
SOUTHERN PACIFIC COMPANY (Pacific Lines)

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on the Southern Pacific Company, Pacific Lines, on behalf of Printer-Clerk E. Patterson, for a call May 27th, 1936 and Printer-Clerk A. Revor for one call on each dates May 28th and 29th, June 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th and 13th, 1936 account an employe not covered by the Telegraphers' Agreement being used by the carrier on dates named to perform duty as a printer-Clerk in 'BD' Office, San Francisco, California."

EMPLOYES' STATEMENT OF FACTS: "On the dates enumerated in the claim the employes named therein were available according to the agreement in effect between the Carrier and Organization, parties to the dispute. They were not used. An employe working in a clerical capacity in the office of the Superintendent of Telegraph (not employed in the telegraph office) was given preference for the work in dispute."

CARRIER'S STATEMENT OF FACTS: " 'BD' Telegraph Office is located in General Office Building of the Carrier at 65 Market Street, San Francisco, California, it is designated in the Telegraphers' current Agreement as a 'General Telegraph Office', and is under the supervision of Superintendent of Telegraph.

"There is in force in the State of California, a statute limiting the hours of labor of females employed in 'any manufacturing.....restaurant or telegraph or telephone establishment or office,.....'. This statute was approved March 12, 1911—identified as Statutes 1911 p.437 ch. 528. The Act, in Section 1, provides in part:

> 'No female shall be employed in any manufacturing—restaurant or telegraph or telephone establishment or office or in the operation of elevators in office buildings, or by any express or transportation company in this state **more than eight hours during any one day of 24 hours,** or more than 48 hours in one week.
>
> (Emphasis ours.)

"During the period May 27th to June 13th, 1936, both inclusive, there were the following regularly assigned positions in 'BD' Office, under the Telegraphers' current Agreement, To Wit:

" 1 Manager
3 Wire Chiefs
2 Mechanicians
3 Telegraphers
4 Telegrapher-Printer Clerks
1 Printer Supervisor
9 Printer Clerks
5 Teletype Clerks
3 Machine Operators

Total 31

telegraphers, not working, will be allowed to displace either THE junior extra telegrapher on the division, or THE junior extra telegrapher in general, relay or dispatchers' offices at any time.'

This rule states that:

'Senior extra telegraphers, **when available and competent, will be used.'** (Emphasis ours)

It should be observed that there were no qualified extra printer clerks available for the extra printer-clerk work, 6:00 A.M. to 8:00 A.M., on the dates involved, neither were any of the extra Morse telegraphers qualified as printer-clerks (Page 3, Paragraph 4, Statement of Facts). To have required one of the regularly assigned printer-clerks, **all of whom were females,** to perform the extra work in addition to filling her bulletined position, would have been in violation of the California Statute (supra). The provisions of the Telegraphers' current Agreement, likewise all contracts, are subordinate to the laws of the State and/or Nation unless otherwise specifically provided in the Agreement or Contract; there is no exception made in the Telegraphers' current Agreement; if there is conflict, the law prevails. All contracts and Agreements are negotiated with the status of the law in mind, and a contract or any part of a contract, the performance of which constitutes a violation of a law, is null and void from its inception. Agreements and contracts are subject to subsequent laws unless otherwise specifically provided for in the contract (there is no such provision in the Telegraphers' current Agreement) hence if the contract provides for an act which was legal at the time the Agreement was entered into, but subsequently that act becomes illegal, a failure to perform the illegal act does not constitute a breach of the contract, it ipso facto suspends the operation of the illegal clause, if and when it constitutes an illegal act. However the statute in question was in full force and effect at the time the Telegraphers' current Agreement became effective, that is, September 1, 1927, hence it must be admitted the contracting parties entered into the agreement subject to the provisions of the statute, and whether they did or not, the law still prevails and is superior to the agreement (contract). Therefore the Carrier was within its rights and not in violation of Telegraphers' Agreement in using Clerk Nief to serve as printer-clerk, 6:00 A.M. to 8:00 A.M., May 27th to June 13th, 1936."

"Carrier contends that in using Clerk Nief to perform extra service, 6:00 A.M. to 8:00 A.M., on the dates involved in this claim, it did not violate any provision of Telegraphers' current agreement.

"Rule 16 of Telegraphers' current Agreement on which Petitioner relies as basis for his claim, is not applicable.

"Petitioner, in asking this Board to grant an Award in favor of claimants on basis cited is in effect requesting the Board to provide a new rule, the granting of which is not within the power of this Board under the provisions of the Railway Labor Act, as amended, and if granted would be in violation of the California Statute, excerpts of which we quoted (supra).

"Even if Rule 16 of Telegraphers' current Agreement were applicable (which it was not), the law of the State of California governing the employment of women prohibits the working of female employes in excess of eight hours per day and the Carrier therefore, could not legally have required the claimants to perform the service for which Petitioner is now presenting claim to this Board.

"Based on the facts herein submitted and the controlling law hereinbefore cited, Carrier respectfully requests the Board to dismiss this claim."

OPINION OF BOARD: The carrier, requiring extra service of a printer clerk between the hours of 6 A.M. and 8 A.M. on the days involved in this dispute and there being no extra printer clerks available, assigned the extra

work to Clerk Nief. The name of this employe did not appear on the official seniority lists of the telegraphers.

The petitioner contends that the carrier in making this assignment violated Rule 2 (c) of the agreement between the parties. This provides that "positions covered by this agreement will be filled by telegraphers taken from the telegraphers' official seniority lists." The petitioner further contends that in the circumstances of this dispute the carrier was required under the rules of the agreement to call the employes regularly assigned to the succeeding eight-hour period, and to pay them under Rule 16 (b). This provides:

> "Telegrapher required to report for duty before assigned starting time and continues to work through his regular shift, shall be paid three (3) hours for two (2) hours' work or less, and time and one-half thereafter on the minute basis for the time required to work in advance of his regular starting time."

The carrier resists payment of the claims presented on two grounds. In the first place, it urges that "Rule 16.....does not require the Carrier to call any particular employe; the rule operates only if the employe is called and/or notified and actually performs work....." In the second place, it urges that to have assigned the claimants—both of whom are women—to the extra service would have been a violation of a statute of the State of California regulating the hours of work of women.

It is the conclusion of the Division that the carrier in assigning extra work covered by the telegraphers' agreement to an employe not on the official seniority lists of the telegraphers was in violation of Rule 2 (c) of the agreement between the parties. This rule is absolute in terms, is not modified by other rules in the agreement, and does not permit the carrier to assign extra service to employes not appearing on the telegraphers' official seniority lists even though there may be no extra employes available at the time for extra service. To protect itself against an embarrassment of this nature, the carrier may add additional employes to the seniority lists or be less generous in the extension of leaves of absence to extra employes. If the carrier fails to protect itself in one of these ways, it is under an obligation to call regularly assigned employes and to pay them for their service on an overtime basis. The fact that the carrier has paid the claimants for the number of days of work guaranteed under Rule 5 does not justify a violation of Rule 2 (c) of the agreement. This rule, while guaranteeing to regularly assigned employes a certain number of days of work during each month, does not prohibit the carrier from assigning extra service to them on an overtime basis.

The Carrier, having violated the rules in question, cannot escape its responsibility for such violations on the ground that Rule 16 does not require it to call any particular employe. The carrier in the circumstances is obligated to compensate some employe or employes who might have been called for the service in question. If no penalty were attached to such a violation, the rules involved would be meaningless. The petitioner, it will be noted, presented the claims in the names of the two employes who most naturally might have been called for the extra service. The Division accordingly concludes that the present claimants are entitled to compensation for the extra service for which they might have been called. The validity of this conclusion is attested by the fact that the carrier voluntarily made a settlement with Mr. McKercher under Rule 5 when an employe not covered by the telegraphers' agreement was assigned to extra work for which McKercher might have been called. Moreover, the carrier in its submission states that "petitioner was informed that if he could find any qualified employe of "BD" Office who was available to perform the service which clerk Nief rendered on the dates involved in the instant claim, that the Carrier would compensate those employes as a result of not having been used and because of having used clerk Nief, on the basis and for the same reason that the Carrier com-

pensated Telegrapher McKercher on June 10, 1936, as admitted by the petitioner."

The carrier insists, however, that the present claimants were not available for extra service on the days involved in this dispute. In support of this contention, it cited a statute of the State of California regulating the hours of work of women. Section 1 of this statute provides in part:

> "No female shall be employed in any manufacturing, mechanical or mercantile establishment, laundry, hotel, public lodging house, apartment house, hospital, place of amusement, or restaurant, or telegraph establishment or office, or in the operation of elevators in office buildings or by an express or transportation company in this state more than eight hours during any one day of twenty-four hours or more than forty-eight hours in one week....."

This presents an issue both delicate and difficult. The carrier at the outset questions both the authority and the propriety of the Division to pass judgment on this issue. It is to be remembered, however, that there is before the Division a dispute within the meaning of Section 3 (i) of the Amended Railway Labor Act which cannot be disposed of without passing a judgment on the issue presented. The Division cannot escape its responsibility in this respect merely because the task is delicate and difficult.

The carrier strongly insists, however, that, regardless of the power of the Division to pass judgment on the issue involved, a statute of a state must take precedence over the contract between the carrier and the Order of Railroad Telegraphers. The Division, however, is of the opinion that in the circumstances of this dispute the agreement between the parties is not controlled by the statute in question.

It cannot be seriously denied that Congress, under its power to regulate commerce between the states, has authority, subject to the limitations of the Constitution, to regulate the wages, hours, and basic working conditions of all employes of carriers engaged in interstate commerce even though some of these employes may be locally stationed and even though their work may have only indirect and remote connection with the actual movement of trains in interstate commerce. The Railway Labor Act of 1926 as amended in 1934, to which the Railroad Adjustment Board owes its existence, brought all employes of interstate carriers under the scheme of the national government for dealing with problems of industrial relations on interstate carriers. The Supreme Court in the case of **Virginian Railway Co. v. System Federation No. 40,** 300 U. S. **515** (1937) ruled that Congress had the constitutional authority to bring the backshop employes of an interstate carrier under federal control. In its opinion the Court said:

> "The activities in which these employes are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as part of them. All taken together fall within the power of Congress over interstate commerce."

It is clear, therefore, that Congress has constitutional authority to enact appropriate legislation regulating the wages, hours, and basic working conditions of all employes of interstate carriers.

It is, of course, undeniable that when Congress has enacted appropriate legislation regulating the working conditions of employes of interstate carriers, such legislation supersedes all state legislation in conflict with it. In this connection the case of **Erie Railroad Co. v. People of the State of New York,** 233 U. S. 671 (1913) is significant. The controversy arose in an action against the carrier by the State of New York for the recovery of a penalty for an alleged violation of a statute of New York specifically regulating the hours of work of telegraph and telephone operators. It was charged that the carrier on certain days required and permitted one of its telegraph operators to work hours in excess of those established by the state law. The car-

rier contended that the state law had no application because Congress, in the enactment of the Hours of Service Act, had exercised its constitutional authority to regulate the hours of work of these employes even though at the time of the alleged violation of the state law the federal law had not gone into operation. The court in sustaining the contention of the carrier, said in part:

> "The relative supremacy of the state and national power over interstate commerce need not be commented upon. Where there is conflict, the state legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the state ceases to exist."

The question, therefore, which must be decided by this Division in the disposition of this controversy is whether Congress in the enactment of the Railway Labor Act of 1926 as amended in 1934 has manifested its purpose to exercise to the exclusion of state control its constitutional authority over wages, hours, and basic working conditions of railway employes brought under the jurisdiction of the federal government by the Railway Labor Act. It is the conclusion of the Division that Congress has so manifested its purpose, and that the collective agreement involved in this dispute takes precedence over an inconsistent state law.

Congress in the enactment of the Railway Labor Act as amended established a unified scheme under which its policies with respect to wages, hours, and working conditions of employes of interstate carriers were to be formulated by the parties in conference with the assistance of two administrative arms of the government, the National Mediation Board and the National Railroad Adjustment Board. It is clear that Congress, if it had elected to do so, subject to the limitations of the Constitution, could have enacted a code establishing definite and in flexible standards of wages, hours, and working conditions of all employes of interstate carriers. Such a code, clearly enough, would have taken precedence over all state laws inconsistent with it. Congress, however, did not elect to announce its policy in the form of an inflexible code. Instead it created a unified scheme under which the parties, subject to government supervision, are authorized to regulate their own problems. The very heart of this unified scheme is the collective agreement between the carrier and the various labor organizations representing various classes and crafts of employes. Confusion and diversity of standards as to wages, hours, and working conditions would be the inevitable result if statutes of the several states were given precedence over these collective agreements. It is worthy of note in passing that under the Railway Labor Act, neither of the administrative arms of the government is authorized to intervene in controversies and disputes relating to wages, hours, and basic working conditions until the parties have endeavored to settle such controversies by their own efforts.

Certain features of the Railway Labor Act clearly indicate that Congress in its enactment has manifested its purpose to exercise its constitutional authority to regulate the wages, hours, and basic working conditions of all employes of interstate carriers, and that it has established a unified scheme to that end.

Attention is first called to Section 2 in which the purposes of the Act are set forth in detail:

> "The purposes of the Act are: (1) to avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employes or any denial, as a condition of employment or otherwise, of the right of employes to join a labor organization; (3) to provide for the complete independence of carriers and of employes in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for prompt

and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions."

More important still is the provision of Paragraph I of Section 2 which states that "It shall be the duty of all carriers, their officers, agents, and employes to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employes thereof." This imposes upon the parties a positive duty to endeavor to make and maintain collective agreements. Moreover, it is to be noted that it does not specify any standards with respect to wages, hours, and working conditions by which the parties are controlled in the making of an agreement. It seems clear, therefore, that these collective agreements required by the Railway Labor Act are an indispensable part of the national policy with respect to industrial relations on interstate carriers.

Further evidence that these collective agreements are an indispensable part of a unified federal scheme is found in other sections of the Railway Labor Act. Paragraph 7 of Section 2 declares that "No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employes, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act." Section 6 provides that changes may only be made in conference between the parties and sets forth conditions governing such conferences. Paragraph 10 of Section 2 declares that "The willful failure or refusal of any carrier, its officers or agents to comply with the terms of third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense."

In view of these provisions, it seems clear that a collective agreement made under authority of the Railway Labor Act is something more than a private contract. It partakes of the nature of a code of industrial relations designed to stabilize employer-employe relations on interstate carriers. While it does not have the force of law, it is required by law and has the approval of the national government. It is, therefore, the conclusion of the Division that Congress in the enactment of the Railway Labor Act as amended has manifested its purpose to exercise its constitutional authority over the wages, hours, and working conditions of the employes involved, that the collective agreements required by this Act are the very heart of the federal scheme for accomplishing the purposes set forth in the Act, and that they take precedence over state laws in conflict with them.

The carrier insists that an award sustaining this claim will place it in an embarrassing position, particularly since the Railway Labor Act does not authorize it to appeal to the courts from an award of the Adjustment Board. This embarrassment, however, is not as serious as it may at first appear. If the carrier is convinced that the state law takes precedence over the collective agreement, it has the privilege of refusing to comply with the award. If then the petitioner, as it may, sues upon the award, the carrier will have an opportunity to get a judicial review of the validity of the interpretation here adopted. If the petitioner does not elect to sue and resorts to other means of enforcement, it seems certain that the carrier may get a judicial review of the legality of this award by asking a court of equity to relieve it of the obligation of the award on the ground that it orders the carrier to commit an illegal act.

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 has jurisdiction over the dispute involved herein; and

That the carrier violated the rules of the agreement between the parties in not calling the claimants for the extra service required on the days involved in this dispute.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary.

Dated at Chicago, Illinois, this 3rd day of August, 1938.

DISSENT ON AWARD 707, DOCKET TE-629

We dissent to the reasons advanced for sustaining this claim and particularly to the conclusion that the California statute regulating the hours of work of women is in conflict with the Railway Labor Act.

The power conferred upon the Congress is such that when exerted it excludes and supersedes state legislation in respect to the same matter. But Congress may so circumscribe its regulation as to leave a part of the subject open to state action, and ordinarily an intention exclusively to regulate will not be implied unless, fairly interpreted, the federal measure is plainly inconsistent with state regulation of the same matter. (Gilvary v. Cuyahoga Valley Railroad Co., 292 U. S. 57, 60).

There is no specific provision in the Railway Labor Act authorizing the inclusion of provisions in agreements, between carriers and their employes, which violates state statutes regulating the hours of labor of female employes such as those here involved. We are not aware of any decision of a court of last resort holding that such authority may be fairly implied. Until a court of last resort shall have held that the Railway Labor Act authorizes the inclusion (or enforcement) of such provisions in agreements between carriers and their employes, or that a state statute such as the one in question is in direct conflict with the Railway Labor Act, it is our opinion that this Division is not justified in so holding.

/s/ R. H. ALLISON
/s/ A. H. JONES
/s/ GEO. H. DUGAN
/s/ C. C. COOK
/s/ J. G. TORIAN