# Award No. 716
# Docket No. TE-632

## NATIONAL RAILROAD ADJUSTMENT BOARD

## THIRD DIVISION

**William H. Spencer, Referee**

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## PARTIES TO DISPUTE:

## THE ORDER OF RAILROAD TELEGRAPHERS

## PACIFIC ELECTRIC RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the General Committee of The Order of Railroad Telegraphers on the Pacific Electric Railway, that all employes coming within the jurisdiction of the current Telegraphers' Agreement, who were in the employ of the carrier on February 20th, 1932, shall be paid at the rate of pay applicable at the time, for any vacations earned prior to February 20th, 1932, but not allowed them by said company."

STATEMENT OF FACTS: On July 1, 1918, all employes, after one year of continuous service with the Company, were granted annually twelve consecutive days vacation with full pay during each year of service.

Effective August 1, 1919, a flat increase of two cents per hour was granted to all employes being paid on the hourly and daily basis in the Mechanical Department and also one cent per hour to such employes who wished to waive the twelve day vacation period and who elected in advance of their vacation year to accept a higher rate of one cent per hour in addition to the increase above mentioned. On August 6, 1919, the Mechanical Superintendent announced that 822 of the Mechanical Department voted for vacations effective with the current year, and 2 employes voted to waive the vacation next year. On account of the exceedingly small number voting to waive the vacations, the plan was dropped. No Mechanical Department employes ever received an increased rate in lieu of the vacations. This offer was not made to the employes coming within the jurisdiction of the Order of Railroad Telegraphers because they were not hourly rated.

Vacations were continued up until, under date of February 20, 1932, the following bulletin addressed to officers and employes was issued over the signature of the President, reading as follows:

> "I regret very much to advise that the low earnings of this Company and the uncertainty as to future earnings, makes it necessary to discontinue for the present year, the twelve days vacation period with pay. When conditions change, every effort will be made to resume these vacations on the same basis as in the past."

Under date of January 20, 1933, a second bulletin over the signature of the President advised that conditions continue to be such that it is not possible for the company to resume vacations with pay during the present year. Again under date of February 19, 1934, a third bulletin advised that conditions continue to be such that it is not possible for the Company to resume vacations with pay and that when conditions change and it is reasonable that the matter be given further consideration, you will be so advised.

On July 1, 1934, where it was possible to grant twelve working days vacation to employes paid by the month without employing additional help and without increasing cost to the Company, such twelve working days vacation with pay were granted at the discretion of head of department. This applied to employes with the Company a year or more prior to July 1, 1934.

It is, therefore, the opinion of the management, that because of such abandonment of the plan of a choice and the continuance of the original gratuity twelve days vacation, as originally instituted July 1, 1918, that such gratuity vacation never became and was in no manner connected with the basic rates of pay. In consequence this claim is not a dispute concerning rates of pay as specified in Section 2 Sixth of the Amended Railway Labor Act which is a contention of the employes, and especially so in the case of the Telegraphers as they were not included in the plan, as they were not hourly rated.

Effective September 16, 1934, the Company entered into an agreement with the employes in agency and tower service, represented by the Order of Railroad Telegraphers, and rates of pay were restored in two installments, one prior to the date of the agreement and the second and last on April 1, 1935, and no provision was made in regard to the question of vacations or vacation pay.

It is therefore, the opinion of the management that upon the consummation of this agreement all previous controversies were, by this agreement, disposed of, as the gratuity vacation plan had been discontinued under authority of bulletin issued February 20, 1932, more than two and one-half years previous to the negotiation of that agreement.

As set forth in the statement of facts this question was previously submitted to the Mediation Board, which Board evidently recognized the case as one within their jurisdiction. After the matter was submitted and ready for decision, the case was withdrawn by Mr. E. J. Manion, President of O.R.T., and in the opinion of the management that action closed the controversies, and this Board is without jurisdiction under the provisions of the Railway Labor Act, as amended.

It will be noted that the rules in regard to granting vacations made it contingent on the employe's having completed one year of continuous service before vacation could be enjoyed. Vacations of six days for six months of service were not perrmitted. If an employe left the service before he had served the complete year of continuous service, he did not receive any vacation. Several such cases were referred by employes leaving the service, to the California Labor Commission in Los Angeles, and the ruling of the Company was sustained in each case. It is, therefore, our opinion that the free twelve days vacation was not to be allowed until after one full year of continuous service and that a division of the vacation period was never contemplated and that payment for a portion would be contrary to the original rule.

It is further the opinion of the management that the original agreement with the employes coming within the scope of the O.R.T. Agreement, settled and determined all controversies then existing in connection with their relations with their employer, and that any claims now made in connection with back vacation pay must be based upon some legal principle, and is not now a grievance or claim to be handled under the provisions of the Railway Labor Act. As any such legal claim which is now made by virtue of the vacation plan discontinued under authority of bulletin issued by virtue of the vacation plan discontinued under authority of bulletin issued February 20, 1932, must have at the latest arisen on that date, it is now barred by virtue of the provisions of Section 337 of the Code of Civil procedure of the State of California, providing that any action upon any contract, obligation or liability founded upon an instrument in writing must be commenced within four years after the accrual of such cause of action, and by reason thereof any claim or claims now made are barred by the statute of limitations and are unenforceable. We therefore request the Board to deny the claim.

**OPINION OF BOARD:** In a bulletin of June 5, 1918, significantly enough entitled "Supplementing Wage Circular," the carrier announced that "all officers and employes, after one year of service with the company, are

granted annually twelve working days' vacation under full pay." The carrier put this plan into operation on or about July 1, 1918. On September 10, 1918, the carrier issued a statement of "Rules Governing Vacations." The first paragraph of this statement follows:

> "During the period of twelve months' regular employment there shall be granted to each employee an annual vacation of twelve working days, under pay, except that before being eligible to any such vacation under pay the employee shall have been regularly employed for a period preceding the year of the vacation of at least twelve months."

In August of 1919, the carrier gave the employees of its mechanical departments a choice of an increase of two cents an hour with a continuation of vacations with pay, or an increase of three cents an hour without the annual vacations with pay. An overwhelming majority of these employees expressed their preference for a continuation of vacations under pay. The carrier accordingly continued its original plan for these employees. The carrier did not give any other group of its employes an opportunity to express their preference. It did, however, continue to give vacations with pay to all of its employees.

On February 20, 1932, the carrier through its president made this announcement to its employees:

> "I regret very much to advise that the low earnings of this company and the uncertainty as to future earnings, makes it necessary to discontinue for the present year, the twelve days vacation period with pay. When conditions change, every effort will be made to resume these vacations on the same basis as in the past."

The carrier, however, was never able to resume the practice of giving vacations with pay. Moreover, it refused to allow its employees to take vacations earned in the year or more preceding February 20, 1932. The claim in this dispute is for the monetary value of vacation earned and not allowed.

There is little or no evidence of record tending to show how the employees reacted to this action of the carrier, or tending to show that they individually or in organized groups made protest against it. It is probably true that the claim here involved was never officially brought to the attention of the carrier until some time in 1934 in connection with the efforts of the Order of Railroad Telegraphers to negotiate an agreement with the carrier covering this class of employees. It is to be noted, however, that until sometime during the year of 1934 these employees were not organized and had no independent agency to represent them in the presentation of grievances to the carrier.

During the year of 1934, certain standard railway labor organizations, having gained the privilege of representing their respective classes of employees, set about the task of negotiating collective agreements with the carrier. The Brotherhood of Railroad Trainmen, which had gained the privilege of representing the train service employees, entered into a mediation agreement with the carrier on December 21, 1934, in which the parties made a settlement of a claim that this class of employees should receive compensation for vacations earned by them and denied by the carrier. The Brotherhood of Railroad Signalmen reached a mediation agreement with the carrier on March 9, 1935, settling a similar claim for the class of employees represented by it. The Federated Crafts, failing to reach a voluntary settlement of its claim, filed it with the Second Division of the Adjustment Board in October, 1937. On May 20, 1938, the Second Division sustained the claim in its Award No. 232.

At the time when the formal agreement between the carrier and the Order of Railroad Telegraphers was consummated with an effective date of

September 16, 1934, it was agred that the employes would be given the opportunity to "negotiate a final restoration of the 1931 rates of pay, sometime between January 1, and April 1, 1935." On April 13, 1935, the parties reached an agreement as to the basis for a settlement of the wage controversy. The scope and meaning of this memorandum agreement is one of the major issues involved in the present dispute. The wage agreement was finally executed on April 27, 1935, effective April 1, 1935. Almost immediately thereafter the parties fell into a controversy over the issue which is now before the Division. Correspondence between the parties concerning the claim continued over a period of two or three months. On October 2, 1935, a representative of the petitioner filed with a representative of the carrier a "claim for compensation for all employes on the Pacific Electric Railway Company represented by the organization, for all that part of vacation earned but not received up to February 20, 1932, when vacations were suspended. . . ." On August 12, 1936, the petitioner requested the service of the National Mediation Board to assist in the settlement of the claim. Before the controversy actually reached the Mediation Board, President Manion of the Order of Railroad Telegraphers withdrew the controvevrsy from mediation. The petitioner on September 20, 1937, after the parties had failed in conference to reach a settlement of the dispute, notified this Division of its intention to file the present claim.

The disposition of this dispute turns upon three major issues which will be discussed in order: (1) Is the claim presented of such character that the Adjustment Board has jurisdiction over it under Section 3 First (i) of the Amended Railway Labor Act? (2) Did the carrier, in the inauguration of its plan for vacations under pay create an obligation on which a valid claim can now be based? (3) Did the parties in their negotiations during 1934 and 1935 settle this claim?

In the first place, the carrier strongly urges that the Division has no jurisdiction because the claim at issue is not a "dispute" within the meaning of Section 3 First (i) of the Amended Railway Labor Act. This provides that the National Railroad Adjustment Board shall have jurisdiction over "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of the approval of this Act." There can be no doubt that the Division has before it a dispute which grew out of the conduct of the carrier occurring on February 20, 1932, when it discontinued vacations under pay with retroactive effect.

In the dispute which was submitted to the Second Division of this Board, the record indicates, that, on February 2, 1935, seven months anterior to the consummation of their agreement with the carrier, the employees involved had presented a written request to the carrier for a settlement of their claim. In the dispute before this Division, so far as the record discloses, the claim of the telegraphers was not presented to the carrier in writing until October 2, 1935, more than a year after the agreement between the parties had become effective. It is to be noted, however, that the carrier's conduct out of which each dispute arose, occurred on February 20, 1932. So far as the jurisdiction of the Board is concerned, neither the fact that the employees in the mechanical departments converted their grievance into a dispute earlier than the telegraphers did nor the fact that they did so before the execution of their agreement is material. Section 3 First (i) of the Amended Railway Labor Act contains no provisions with respect to the time when employees must convert grievances into formal disputes.

The carrier insists, however, that the dispute or grievance did not arise out of the interpretation or application of an agreement within the meaning of Section 3 First (i) of the Amended Railway Labor Act. In support of this contention, it points out that the alleged dispute or grievance arose out of conduct which occurred on February 20, 1932, further that the collective

agreement between the parties did not become effective until September 16, 1934, and that in any event there was no agreement between the parties. As will be pointed out subsequently, however, there was an agreement between the carrier and its employees prior to February 20, 1932, concerning rates of pay, which the carrier abrogated on February 20, 1932, as it was entitled to do. The fact that this was a special type of agreement, neither as formal nor as comprehensive as that which the parties entered into on September 16, 1934, is not material. Section 3 First (i) does not limit the jurisdiction of the Adjustment Board to disputes arising out of the interpretation or application of formal, collective agreements.

The carrier further insists that even though this dispute may have arisen out of an agreement between the parties concerning rates of pay, the disputue was not "pending and unadjusted on the date of the approval of this Act." In view of the circumstances disclosed by the record, this contention of the carrier cannot be sustained. As will be pointed out subsequently, the carrier on February 20, 1932, attempted to divest these employees of vacation rights which they had already earned under an agreement with the carrier. Nothing occurred prior to April 13, 1935, tending to show that these employees either individually or in organized groups surrendered their right to insist upon an adjustment of their claim which is now before the Division. In view of the fact that the employees involved were not organized at the time involved, that they had no independent agency to represent them in dealing with the carrier, and that the carrier had not set up machinery for the adjustment of such claims, the failure of the employees to protest or to take positive action cannot be regarded as evidence of their intention to forego whatever claim they may have had against the carrier. When the Order of Railroad Telegraphers in 1934 gained the right to represent this class of employees, it proceeded with reasonable dispatch to create a dispute on the basis of the carrier's conduct which occurred in 1932. It would seem, therefore, that the phrase "pending and unadjusted," whatever may be its proper meaning, has no application to a dispute which was created after the approval of the Amended Railway Labor Act in 1934, even though the conduct on which the dispute was based occurred before the approval of the Act. This conclusion is supported by Award No. 444 of this Division in which it ruled that it had jurisdiction over a dispute which arose out of conduct of the carrier occurring more than three years prior to the approval of the Act, and which was not presented to this Division for adjustment until approximately two years after its approval.

The Division accordingly concludes that it has jurisdiction over this dispute and should now dispose of it on its merits.

In the second place, the carrier urges that its undertaking to accord vacations with pay was a gratuitous promise, that the undertaking did not become a part of the contract of employment, and that, therefore, no valid claim can now be based upon it. The carrier made substantially the same contention in the dispute which the Federated Crafts presented to the Second Division of the Adjustment Board. In its submission in that controversy, the carrier stated:

> "It is, therefore, the opinion of the management that because of such abandonment of the plan of a choice and the continuance of its original gratuity twelve days vacation, as originally instituted July 1, 1918, that such gratuity vacation never became and was in no manner connected with the basic rate of pay. . . ."

The contention of the carrier that its undertaking or proposal was gratuitous cannot be sustained. In the first place, the record clearly indicates that the carrier made this proposal as a part of the price it was willing to pay to its employees in an effort to discourage them from organizing themselves for the purpose of collective bargaining. This alone clearly proves that the carrier in making the proposal involved was not in a gift-giving frame of mind. In the second place, no one can doubt that the wage that

the carrier paid, including the inducement of vacations under pay, was forced on it by competitive conditions. It cannot be denied that vacations with pay, bonus plans, and profit-sharing plans are inducements which employers utilize to secure competent and loyal employees. These inducements are clearly a part of the wage structure whenever and under whatever name employed.

The Second Division based its award on the finding that "the vacation plan was entered into after the wishes of the employes were ascertained as to whether they desired the vacations or an increase in the hourly rate." It was contended on behalf of the carrier that, because of this finding as well as for other reasons, the award of the Second Division should be given no weight in the disposition of this dispute by this Division. The contention is based upon the assumption that because the carrier did not poll the telegraphers as to their wishes, the plan for vacations with pay with respect to them had no contractual basis.

The contention that the claim of the employees of the mechanical departments had a contractual basis and that the claim of the telegraphers had not is to confuse form with substance. It is a well settled rule of the common law, to which there are few exceptions, that no particular form or ceremony is required in the formation of simple contractual relations. An offer or proposal may be communicated in the most informal manner, and the acceptance may be implied from conduct as well as from words. In the case of the mechanical employees, the carrier specifically asked for an expression of an assent in a certain manner. In the case of the telegraphers, it made a proposal and specified no form of assent by way of acceptance. The proposal it made was unilateral in character—a promise calling for performance by way of acceptance. In the situation under review, the employees accepted the proposal of the carrier by remaining in its employ in reliance on this and other wage inducements.

Although the exact situation presented by this dispute has apparently not arisen in courts of law, several closely analogous situations have. In all of these the courts have decided in favor of the employee. A leading case, presenting a situation closely analogous to that in this dispute, is found in **Zwolanek v. Baker Manufacturing Company,** 150 Wis. 517 (1912).[1] Here the company adopted what it described as a by-law which recited that the company recognized "that the earnings of capital and labor are determined by competition, and believes that, after both have been paid the prices so determined, all surplus earnings should be divided between capital and labor in proportion to the amounts received by each." The so-called by-law then proceeded to state the manner in which the surplus earnings were to be divided between capital and labor. It provided among other things, that "any person who shall have been in the regular employ of the company for 4,500 hours during 100 consecutive weeks shall thereupon begin to participate in profit-sharing, provided he does not quit the employ of the company or is not discharged prior to January 1 of any year." Apparently the company did not officially notify its employees of this action, but the evidence indicated that the employee involved in the action knew of it and relied upon it.

Prior to January 1, 1911, the employee involved had worked more than 4,500 hours during 100 consecutive weeks. On the basis of the hours worked and the earnings of the company in the period in question, the plaintiff's share in the profits amounted to $854. On December 30, 1910, the company dismissed the employee in question for alleged cause. He thereupon sued for his share of the profits. The company by way of defense contended, among other things, that it had discharged the plaintiff for cause, and that the so-called by-law was not a part of the contract of employment, and accordingly, gave the plaintiff no legal right to share in the profits earned. The court overruled these pleas of the company and permitted the plaintiff to recover.

[1] Other analogous cases are discussed in 44 Lawyers Reports Annotated (New Series), page 1214 (1913).

In reply to the company's argument that the by-law was not an offer to the employees, the court said:

> "To allow the employer in such a case to repudiate liability on the ground stated would come perilously near conniving at the perpetration of a fraud; and no court should say that in such a case the by-law merely affected the corporation and not third persons."

The Court also said with respect to this contention:

> "We regard this by-law as being simply the offer of a reward to employees for constant and continuous service."

In answer to a contention of the employer that the employee had never accepted the proposal, the court said:

> "The offerer may prescribe whatever terms he sees fit; and such terms must be substantially complied with before a recovery can be had. . . ."
>
> "Performance constitutes acceptance of the offer, and after performance it cannot be revoked, so as to deprive a person who has acted on the good faith thereof of compensation."

In answer to the contention that the employee was not entitled to any part of the profits earned during the period in question because he was not on the payroll on December 31, 1910, the court said:

> "And it has been held that where the claimant has performed part of the service and is prevented by the offerer, or by those for whose acts he is responsible from completing the work, he is entitled to the whole reward, or at least to compensation on quantum meruit."

The Division concludes that the system of vacations with pay involved in this dispute was based upon a contractual relation between the parties, that the additional inducement for efficient and loyal service was an indispensable part of the basic rate of pay, and that, while the offerer could revoke the unilateral offer when it desired to do so, it could not divest these employees of the vacation rights already earned.

In the third place, did the petitioner in the negotiation of the agreement of September 16, 1934, surrender the claim which is now before the Division? The carrier contends that it did. In its submission in the dispute before the Second Division the carrier made substantially the same contention with respect to the effect of the collective agreement between the carrier and the Federated Crafts. In its award the Second Division rejected this contention. There is nothing in the record in this dispute to indicate that the petitioner in entering into the agreement in question intended to forego its claim for an adjustment of the claim in question.

The carrier, however, strongly insists that the petitioner did surrender this claim in the negotiation of the wage agreement of April 27, 1935, effective April 1, 1935. The petitioner emphatically denies that it did. It is necessary, therefore, to examine in some detail the evidence of record bearing on this issue.

When the parties had completed their negotiations of the agreement which became effective on September 16, 1934, it was understood that the employees would be afforded an opportunity sometime between January 1 and April 1, 1935, to discuss the restoration of the rates of pay prevailing in 1931. On April 9, 1935, during the negotiations on wages, Mr. Lewis, Vice-President of the Order of Railroad Telegraphers, made two written proposals to the carrier. One proposal included a request for the restoration of vacations with pay. The second included a request "for the payment amount due to each employee for vacations earned during the years of 1931, and 1932." The carrier rejected both proposals. On April 12, 1935, Mr. Lewis wrote to Mr. Bradley, representing the carrier:

"Referring to our conference on the question of rates of pay for agents, assistant agents and towermen. We are agreeable to closing the matter under the following plan:

"Compute wages due the employes by the restoration of the last half of the deductions put into effect since January 1932, adding to that amount the money value of the vacations accruing to them under the vacation practices in effect in 1931."

The carrier accepted this proposal on April 13, 1935. On April 27, 1935, the parties formally executed the wage agreement based on this formula.

There can be no doubt that, in view of the contents of the three proposals of the petitioner, the time relationship between the proposals of April 9, which were declined by the carrier, and the proposal of April 12, which was accepted by the carrier, standing alone, strongly supports the contention of the carrier that the wage agreement of April 27 should operate not merely as the establishment of rates for the future but also as a settlement of the dispute with respect to the claim for vacation adjustment.

There are, however, matters to be weighed other than the mere proximity in time between the proposals rejected and the proposal accepted. The proposal which was accepted bears internal evidence with respect to its scope and meaning. Looked at from this point of view, it is clear that this agreement relates entirely to a wage rate to be applied in the future. The reference in the second paragraph to the vacation practice of 1931 merely indicates one of the bases upon which the new rate was to be established. The statement that "new rates so established to become effective April 1, 1935," clearly indicates that the purpose of the agreement was for the establishment of a new rate of pay. In view of the importance which this issue had assumed by the time in question and in view of the further fact that the carrier had already made settlements with the signalmen and the train service employees, it is significant that the proposal made no reference to the alleged willingness of the petitioner to surrender the claim of the employees now in dispute.

Moreover, there is evidence outside the wage agreement in question which supports the contention of the petitioner in this dispute. On April 30, 1935, three days following the date of the wage agreement which was executed on the basis of the memorandum of April 13, General Chairman Pritchett wrote to Assistant to General Manager Bradley:

"In connection with the conference held in the office of Vice President and General Manager, Mr. O. A. Smith, Pacific Electric Railway Company, on April 11th, at which time it was definitely decided that the employes represented by The Order of Railroad Telegraphers on the property would not have their vacations returned to them, this is to confirm the understanding had then to the effect that at some subsequent date the question involving payment of cash in lieu of vacations due those we represent, in 1931 and 1932 would be a matter of conference."

It is difficult to believe that the General Chairman would have thus committed himself in writing unless there had been some understanding on April 11 that the claim for disputed vacation rights would be scheduled for later discussion. Moreover, it is even more difficult to believe that, unless some such understanding had been reached as stated by the General Chairman, the carrier would not have immediately replied, emphatically denying the existence of any such agreement or understanding. The carrier, as the record indicates, did not reply to this communication until he had received a second communication from the General Chairman, reminding Mr. Bradley of the previous communication, and asking for a conference on the claim. In his reply to the second communication of the General Chairman, Mr. Bradley arranged for a conference but did not make any comment on the

claim of the General Chairman as set forth in his communication of April 30 to him.

The parties conferred on October 2, 1935. At this time the General Chairman handed to Mr. Bradley a formal, written claim for an adjustment of the dispute. This presumably was the basis of their conference. On October 12, 1935, the carrier replied in part:

> "As explained to yourself and members of your committee during negotiations in connection with original agreement also supplemental agreement in connection with wage rates, the company has granted to employes you represent an increase in wages equivalent to the cost of free vacations when same were being granted, with the understanding that such increase in wage rates was the equivalent of restoration of free vacations.
>
> "Under the circumstances the Company cannot consistently comply with your request that such employes be compensated for portions of vacations earned in 1931."

In this communication the carrier does not directly state that the petitioner in the negotiations of the wage agreement agreed as a part of that transaction that it would surrender its claim for an adjustment of the vacation controversy. The carrier merely states that the vacation with pay was one factor weighed in fixing the new rates of pay. In the concluding statement, the carrier, still without alleging that the wage agreement operated as a settlement of the claim in question, merely states that "it cannot consistently comply with your request that such employes be compensated for portions of vacations earned in 1931." It was not until the General Chairman replied to Mr. Bradley on October 20, that the issue now under consideration was sharply articulated.

On the evidence of record the Division concludes that the petitioner neither in the negotiation of the agreement effective September 16, 1934, nor in the negotiation of the supplemental wage agreement of April 27, 1935, agreed expressly or by implication to surrender its claim for an adjustment of the rights of the employes represented by it with respect to vacations earned prior to February 20, 1932.

**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 employees involved in this dispute are entitled to compensation for vacations earned prior to February 20, 1932, in accordance with their claim.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 12th day of August, 1938.