Award No. 898
Docket No. CL-870

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Lloyd K. Garrison, Referee

PARTIES TO DISPUTE:

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

KANSAS CITY TERMINAL RAILWAY COMPANY

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood for payment of a minimum day's pay of eight (8) hours per day for such days worked and paid less than eight (8) hours, to employes of Mail and Baggage Department, Union Station, Kansas City, Missouri."

EMPLOYES' STATEMENT OF FACTS: "An Agreement between the parties covering hours of service and working conditions has been in effect since March 1, 1924. A revision of said Agreement of March 1, 1924, was effective February 17, 1936.

"Memorandum Agreement between the parties (copy of which is attached and marked Exhibit A) was signed January 31, 1929.

"Memorandum Agreement between the parties (copy of which is attached and marked Exhibit B) was signed to become effective May 1, 1929.

"Memorandum Agreement between the parties (copy of which is attached and marked Exhibit C) was signed February 17, 1936, concurrently with revised Agreement of same date.

"The representative of the employes served notice upon the carrier September 8, 1938, terminating the Memorandum Agreement of May 1, 1929. Copy of the notice is attached, together with copies of subsequent correspondence, all of which is marked Exhibit D, being as follows:

"Letter of General Chairman, C. A. Schutty, dated September 8, 1938, addressed to Mr. B. J. Duffy, President; letter of B. J. Duffy, dated September 15, 1938, addressed to C. A. Schutty; letter of C. A. Schutty, dated September 28, 1938, addressed to Mr. B. J. Duffy; letter of C. A. Schutty, dated October 7, 1938, addressed to Mr. B. J. Duffy; letter of Mr. B. J. Duffy, dated October 18, 1938, addressed to C. A. Schutty; letter of C. A. Schutty, dated October 19, 1938, addressed to B. J. Duffy.

"The carrier has, since October 9, 1938, continued to work and pay the employes involved four hours daily.

"The following Rule (now No. 28) was and is a part of the Agreements of March 1, 1924, and revised Agreement of February 17, 1936:

> 'RULE 28. DAY'S WORK. Except as otherwise provided in Rule 29, eight (8) consecutive hours work, exclusive of the meal period, shall constitute a day's work.' "

rules as exist.' Basic matters involving the rates of pay, rules and working conditions to be established fall within the jurisdiction of the Mediation Board.

"Therefore, the Management requests the Board to hold itself without jurisdiction in this dispute and to dismiss the claim of the Organization."

There is in evidence an agreement between the parties bearing effective date of February 17, 1936, from which Rule 28 has been cited by the petitioners.

OPINION OF BOARD: The central issue is whether the provision for the establishment of a casual force, contained in the Memorandum Agreement of May 1, 1929 (hereinafter referred to as the 1929 agreement) was effectively terminated by the employes' notice of September 8, 1938. If the termination was not effective the claim must be dismissed.

The 1929 agreement, after authorizing the creation of a casual force and taking the casual force out of the scope of the general agreement between the parties (executed in 1924), provided that:

> "THIS AGREEMENT shall be in effect from May 1st 1929 until thirty (30) days written notice shall have been given by either party of a desire to change or terminate the same."

Thus by express provision the 1929 agreement establishing the casual force was terminable by either party at any time upon 30 days written notice.

On February 17, 1936, after lengthy negotiations, the parties entered into a new general agreement. On the same date they entered into a separate Memorandum Agreement providing as follows:

> "It is understood that Memorandum Agreement of May 1st, 1929 (Casual Force) remains in effect and is not superseded or affected by new agreement of current date between parties named above."

If this language is taken to mean what it says, clearly no change was made in the 1929 agreement, which was neither to be "superseded" nor "affected" by the execution of the new general agreement. That being the case, the 1929 agreement continued to be terminable by either party upon notice as therein provided.

The carrier, however, asserts that the Memorandum Agreement of February 17, 1936 was executed in consideration of the execution of the general agreement of the same date, in view of concessions made to the employes in the main agreement; and that the intent of the February 17 Memorandum Agreement was that the casual force provision of the 1929 agreement should be deemed to be a part of the general agreement and to be permanent and no longer terminable by notice.

In order to establish this intent the carrier relies on what took place in the negotiations leading up to the execution of the February 17, 1936 documents. On December 22, 1934 the employes notified the carrier that in accordance with Section 6 of the Amended Railway Labor Act and Rule 49 of the existing agreement:

> "We hereby give notice of an intended change in the Agreement * * * * dated March 1, 1924, and modifications thereof incorporated in the Memorandum of Agreement of May 1, 1929. * * * * *"

The carrier points to this notice as indicating that the employes regarded the two agreements as one instead of treating the 1929 agreement as if it stood on its own feet, in which case notice of modification would naturally have been given under the terms of the 1929 agreement itself rather than under the terms of the general agreement. There is, however, nothing in

the record to show that at that time the employes considered the termination clause of the 1929 agreement as no longer operative. The 1929 agreement had in fact been executed after the then existing general agreement had been executed; it was certainly intended when it was made to be terminable by notice in accordance with the express provision to that effect, and there is not a particle of evidence to show that at some subsequent time the parties had agreed to treat the termination clause as no longer in effect.

During 1935 negotiations for a new general agreement went forward. On July 15, 1935 the employes wrote the carrier stating in substance that since the proposed agreement would change the working conditions of employes "affected by existing Memorandum Agreements our Committee feels it is obvious the Memorandum Agreements must be canceled upon completing negotiations and signing new Agreement." The carrier replied (July 23) to the effect that if the employes would incorporate the memorandum agreements in the new agreement the carrier would accede to their cancellation; but if not so incorporated the memorandum agreements should continue in effect.

It may be inferred from this correspondence that the memorandum agreements contained concessions to the carrier which the employes wished to modify by cancelling the memorandum agreements and by appropriate clauses in the new agreement; and that the carrier wished to retain the concessions either by continuing the memorandum agreements or by cancelling them and incorporating their terms in the new agreement. This is the inference which the carrier draws, and it is not unreasonable, though it should be noted that the reference to memorandum agreements is in the plural, and precisely what the parties had in mind with respect to the 1929 agreement is not apparent.

However, a week later (July 30, 1935) the employes advised the carrier that changes had been proposed in the new agreement which would necessitate cancellation of the 1929 agreement; to which the carrier replied (October 8) that it would accede to this cancellation only if the provisions of the 1929 agreement were incorporated in the new agreement.

A little later (October 21) the employes informed the carrier that they were not willing to continue the 1929 agreement in effect after the execution of the new agreement, and that they were equally unwilling to incorporate its provisions in the new agreement.

Thus a temporary impasse was reached. The employes wished to eliminate altogether the casual force provision. The carrier wished to retain it and presumably to make it permanent by incorporating it in the new agreement.

What proposals and counter-proposals were thereafter made we cannot tell from the record. On December 16, 1935 the employes advised the carrier that:

> "In view of understanding reached at conference held December 12, 1935 between you and Mr. Harrison and Mr. Lyons, we are withdrawing that portion of our letter of December 22, 1934, which served to notify of an intended change in memorandum agreement of May 1, 1929 (casual force)."

About two months later the new general agreement and the new memorandum agreement were executed, as described above.

What was the "understanding" referred to in the employes' letter of December 16, 1935 to the carrier? The understanding, according to the carrier, was that the 1929 agreement, while remaining as a physically separate document, was to be treated as if it were a part of the new general agreement when the latter should be executed; that it was to become permanent and cease to be terminable by notice; and that the only reason for not physically incorporating it in the general agreement was that the em-

ployes did not wish to publicize the permitted perpetuation of the casual force. If this construction of the "understanding" is correct, it follows that the employes had abandoned their position of October 21, 1935, at which time they were insisting that the casual force provisions should neither be incorporated in the new agreement nor continued in effect after the execution of the new agreement. Carrier states in its reply brief that "it seems clear that the carrier made concessions to the Brotherhood in the rules of the main agreement" which induced the employes thus to reverse their position of October 21. This is the crux of the carrier's case and upon it rests the argument that the memorandum agreement of February 17, 1936 must be construed to give effect to the "understanding" as thus delineated by the carrier.

The employes, on the other hand, contend that the "understanding" was precisely that which was indicated by the memorandum agreement of February 17, 1936; namely, that the 1929 agreement was neither to be superseded nor affected by the new general agreement but was to remain in effect just as it was written, including its provision for termination by notice. If the "understanding" was as thus stated by the employes it means that the carrier had abandoned the position it had taken in October.

Thus the case seems to boil down to this. One side or the other must have abandoned the position it had taken in October. The carrier says that it was the employes who abandoned their position and "that it seems clear that the carrier made concessions" in the new main agreement which brought about this result. But the carrier nowhere states what these concessions were, and there is no evidence in the record to support the carrier's contention except its own bare statement. The employes' case rests on the contrary assertion that the carrier and not the employes abandoned the position taken in October. Again there is no evidence in the record outside of the documents themselves.

Under these circumstances there is nothing to justify a finding as to what the "understanding" referred to in the December correspondence actually was. We must therefore restrict ourselves to an interpretation of the memorandum agreement of February 17, 1936 as it was written.

To uphold the carrier's contention we would have to give to this agreement a sense actually the opposite of the words used. We would have to construe the provision that the 1929 agreement was "not to be superseded or affected" as though it meant that the 1929 agreement was to be deemed a part of the general agreement and was to be altered by striking out its termination clause.

We are not at liberty to do such violence to the language used by the parties unless the record clearly establishes that they intended a different meaning by the words used. No such clear intention can be found in the record.

The carrier finally contends that in any event the 1929 agreement could not be terminated by notice, but that the procedure for modifying agreements laid down in the Amended Railway Labor Act (enacted subsequent to the 1929 agreement) must be followed. With this contention we cannot agree. The 1929 agreement was in the nature of a suspension or waiver of a rule in the general agreement (the present Rule 28). Since, as we are compelled to conclude, the 1929 agreement has not been "superseded or affected," its termination clause remains in effect equally with its other provisions, and we cannot believe that the Amended Railway Labor Act was intended to destroy such a clause or to prevent the parties to an agreement from entering into temporary suspensions or modifications, terminable by notice, of some one or another provision of the agreement.

On October 18, 1938 the carrier advised the representative of the employes that:

"If you insist upon your position you may consider the general agreement effective February 17, 1936, also abrogated."

Relying upon this notification the carrier, while contending on the one hand that the 1929 agreement became a permanent and non-terminable part of the general agreement, also contends that as a result of the notification the general agreement has ceased to exist and therefore the employes have nothing upon which to base a claim.

The general agreement does not contain a termination clause. Rule 60 provides that the agreement:

"* * * * shall continue in effect until it is changed as provided herein or under the provisions of the Amended Railway Labor Act.

Should either party to this agreement desire to revise or modify these rules, thirty (30) days written advance notice, containing the proposed change, shall be given and conferences shall be held immediately on the expiration of said notice unless another date is mutually agreed upon."

It is impossible to construe the carrier's letter of October 18, 1938 as a notice of the sort contemplated in Rule 60, and even if it were possible no conferences have been held or sought as required by Rule 60, and in practice the agreement has been treated (as the carrier itself treats it throughout all but one small portion of its reply brief) as still in effect.

We conclude that the termination of the 1929 agreement in the manner provided for therein was effective and that the February 17, 1936, agreement remains in force. That being so, Rule 28 is controlling.

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

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Rule 28 governs, effective October 9, 1938.

AWARD

Claim sustained, effective October 9, 1938.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 24th day of July, 1939.