Award No. 1130
Docket No. SG-1103

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Benjamin C. Hilliard, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF RAILROAD SIGNALMEN OF AMERICA

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY

STATEMENT OF CLAIM: "(a) Claim for termination of short work week practices and restoration of the regular schedule of employment of six days' work per week for all Signal Department employes affected.

"(b) Claim in behalf of all employes affected for compensation lost since January 3, 1938, due to the arbitrary action of the railway management of again placing into effect and continuing a share the work practice in disregard of protests of the General Chairman.

"(c) Claim for compensation lost from September 1 to October 8, 1937, due to failure of the railway management to terminate share the work practices and restore the regular employment of six days a week as of September 1, 1937; such claim in behalf of all Signal Department employes who were retained in service following the adjustment of force made on October 8, 1937, coincident with restoration of the regular six day work week."

EMPLOYES' STATEMENT OF FACTS: "Prior to May 1, 1930, Signal Department Employes on this railroad always worked a regular schedule of eight hours a day, six days a week. This had been the practice or custom for many years and it was upon that basis that all hourly rates of pay were established and the various rules in the agreement covering working conditions were negotiated and made effective. The number of employes fluctuated with changing conditions and when reductions in expenses were made the men with least seniority were laid off, or furloughed, in accordance with the seniority rules.

"The business depression caused many Signal Department employes on this railroad to be laid off and as it continued, the employes were confronted with further reductions in force from time to time. As a result of this possibility, the employes entered into an agreement with the carrier whereby arrangements were made to divide up the time to be worked by the entire group in order that the junior men would not be entirely deprived of employment. The management of the railroad proposed that all the men work a schedule of five days a week, in place of the regular or normal schedule of six days a week, in lieu of further force reduction, and the employes accepted such an arrangement with the understanding that they could and would revert to the regular work week of six days when they desired to do so upon thirty days' written notice, and if force reductions were then necessary the seniority rules would govern. This arrangement for a five day work week, in place of the regular employment of six days per week, obviously resulted in the loss of one-sixth of the normal wages of all the men,

OPINION OF BOARD: Whether the employes in whose behalf this inquiry is proceeding may rightly claim employment on a six-day work-week basis, as, of, or from September 1, 1937, or of whatever date, if at all, is all important.

It appears that while the original wage agreement between the parties did not definitely fix a six-day work-week, it seems that at all times prior to May, 1930, the employes, the number fluctuating according to the need of the service, worked a regular schedule of eight hours a day, six days a week (or more), and that that service constituted the predicate on which hourly rates of pay were established and working conditions were negotiated and made effective; that in the month mentioned, and without consultation with its employes, the carrier inaugurated a share-the-work practice of a five day or even shorter week, as the result of which employes whose seniority would have entitled them to the usual six day week rating, on the five day rating suffered a wage loss of 16 2/3% per week; that at times the carrier gave only four and even as low as three days of employment per week, and, as before, seniority rules were disregarded; that May 1, 1935, the parties entered into an agreemnt captioned as follows: "Memorandum of agreement between the New York, Chicago and St. Louis Railroad Company and its Employes Represented by the Brotherhood of Railroad Signalmen of America Covering the Temporary Establishment of a Five-day Work-Week." The first paragraph of that agreement reads: "It is hereby mutually agreed that all Signal Department Employes, covered by the current agreement between the parties hereto, will for a temporary period as hereinafter provided, work five days per week instead of the normal schedule of six days per week, * * *." This agreement was to continue in effect until January 1, 1936, and thereafter to be subject to "cancellation or modification upon thirty days' written notice served by either party." In the year mentioned the five-day work-week was terminated and the six-day schedule was reestablishd; but later in the same year, the carrier, proceeding unilaterally, again put into force a share-the-work practice by means of a five-day work-week. August 5, 1937, following lengthy negotiations in relation to the share-the-work problem, in which many railroad companies and their employes, including those here, a "Mediation Agreement" was entered into, one item of which reads: "2. Share-the-work practices however established will be terminated on request of General Chairmen. No such request shall be made however prior to September 1, 1937. This is intended to bring about regular employment to such forces as are required by each carrier. Forces will be increased or decreased in conformity with the seniority rules (or supplementary agreements while in effect), on the individual carriers." The General Chairman of the activity here, acting conformably to the mediation agreement, made request for its termination, to be effective September 1, 1937. The carrier did not immediately respond favorably to the request for termination of the contract, but on October 8, 1937, as the result of correspondence and direct negotiations between the parties, the carrier did reestablish the six-day work-week, in development whereof it reduced the force and caused the territorial zones of service to be lengthened or otherwise altered in accordance with the practical necessities. That schedule remained in effect until January 3, 1938, when the carrier—the employes protesting such action—again reverted to the five-day work-week, a schedule which it kept in force until November 1, 1939. On that date the carrier returned to the six-day work-week, a condition continuing hitherto.

While, as already recited, the original wage agreement did not specifically provide for a six-day work-week, we think that by "supplemental understandings mutually entered into," and which were not thereafter mutually abrogated, the equivalent of such a provision came into effect and became as if of the original contract. Considering the extended correspondence between the carrier and the employes while negotiations to that end were being conducted, the pronouncements and orders by responsible carrier representatives to authorized employe representatives in recognition of the "supplemental understandings," such as establishing new locations,

new headquarters, extending or otherwise altering territories, assigning certain employes to this territory and others to that location or headquarters, proclaiming the rank of the employes thus assigned, and naming those who were to be furloughed, the whole being recognized by the employes as in effect and controlling upon them, any conclusion other than the one we have reached would do violence to the record.

May 21, 1938, the National Mediation Board, being thereunto properly moved, gave an interpretation of its "Item 2 of the Mediation Agreement" (already quoted), and after declaring that in and of itself the item mentioned does not import a six-day work-week, it added: "If these existing agreements guarantee six days' work, **or if there are supplementary understandings mutually entered into controlling the length of the work week, then the carriers, of course, are obligated to live up to them.**" Giving effect to the quoted language which we have emphasized, we think the carrier and employes here, proceeding competently and advisedly, effective on and after October 8, 1937, became committed to a six-day work-week.

Thus premised, and proceeding in the light of the record, we are disposed to the view that, as contended by counsel for the carrier on oral presentation, claim (a) became moot by virtue of the carrier's order of November 1, 1939, putting a six-day work-week into effect. It will be understood, of course, that we would regard unilateral abandonment of that order as contrary to our interpretation of the requirements of the record. Logically, our determination as to the meaning of the "understanding" of October 8, 1937, in mind, claim (b) should be sustained. Claim (c), based on the period between September 1, 1937, when the temporary agreement heretofore discussed was terminated, and October 8, 1937, during which time the parties were actively engaged in negotiations that culminated in the composition of the October date, we think should be denied. There was no contract, or "understanding," prior to October 8, 1937, upon which a demand for a six day week could be based. Besides, the time "lost" there was profitably employed by the parties in reaching an enduring accord. The employes should submit to their reasonable contribution.

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 the carrier violated the "understanding" of October 8, 1937.

AWARD

Claim (a) moot; claim (b) sustained; claim (c) denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 18th day of June, 1940.

Dissent to Award No. 1130, Docket No. SG-1103

Confusion so permeates the Opinion of Board which leads to the award in this case as to render the basis for it inexplicable. Necessarily, therefore,

this dissent primarily shows that confusion by reference to the statements in the Opinion which not only are contrary to the record, but are contradictory as of themselves. They will be discussed in the order of their appearance in the Opinion.

The second paragraph of the Opinion, stating the conditions of employment in preceding years, lays the foundation for the continuing error and confusion in these statements which are contrary to the record as presented both by petitioner and respondent:

> "* * * * that in the month mentioned, (May, 1930) and without consultation with its employes, the carrier inaugurated a share-the-work practice of a five day or even shorter week, as the result of which employes whose seniority would have entitled them to the usual six day week rating, on the five day rating suffered a wage loss of 16 2/3% per week; that at times the carrier gave only four and even as low as three days of employment per week, and, as before, seniority rules were disregarded * * * *"

The record, of course, shows that the respondent carrier directly stated that the original and successive steps in reduction of number of employes and number of days worked were made as "the work required" and not as a share-the-work practice, and of course maintained its adherence to seniority rules in those procedures. The petitioners state the facts in that respect as they are quoted on the first page of this Award containing the Opinion. The words are here shown for immediate reading:

> "The business depression caused many Signal Department employes on this railroad to be laid off and as it continued, the employes were confronted with further reductions in force from time to time. As a result of this possibility, the employes entered into an agreement with the carrier whereby arrangements were made to divide up the time to be worked by the entire group in order that the junior men would not be entirely deprived of employment."

There being no remaining source in the record for the statement of the conditions of employment as of May, 1930 and thereafter as given by the Opinion, the only thing that can be said about the Opinion's statement is that it is not one of fact and is without any basis.

The next statement evidencing confusion is the third from last sentence of the second paragraph of the Opinion which reads:

> "The carrier did not immediately respond favorably to the request for termination of the contract, but on October 8, 1937, as the result of correspondence and direct negotiations between the parties, the carrier did reestablish the six-day work-week, in development whereof it reduced the force and caused the territorial zones of service to be lengthened or otherwise altered in accordance with the practical necessities." (Underscoring ours.)

The reference to **contract** here was to the contract or agreement of May 1, 1935 which the parties had entered into. The request for termination to which the carrier was asked to respond was in respect to the Mediation Agreement of August 5, 1937 and related to share-the-work practices however established. The Opinion itself in preceding sentences of the same second paragraph thereof recites that the contract of May 1, 1935 was terminated in the year 1936. How then could the request in line with the August 5, 1937 Mediation Agreement relate to a contract that had terminated? There was and still is no reasonable answer; confusion still prevails.

Naturally, if facts fundamental to sound decision be mistakenly apprehended, conclusions drawn therefrom cannot be other than mistakes. It is not more than natural expectancy then to find the conclusion in the next

or third paragraph of the Opinion that an agreement upon a six-day work-week "came into effect and became as if of the original contract," despite that one of the two parties to that agreement consistently and proclaimedly refuted such intention or purpose by refusing to make such an agreement in connection with the various actions relating to re-establishment of territories described in this third paragraph, which actions indeed are those found by the Opinion to constitute the agreement upon a 6-day work-week which the carrier then and thereafter declined to enter into.

The Opinion at that point declared that such agreement came about by "supplemental understandings mutually entered into,"—the Opinion quoting those words from the Mediation Board's Interpretation of Item 2 of the August 5, 1937 Mediation Agreement, and evidently thus giving application to that Interpretation. Only a reading of Item 2 and the Mediation Board's Interpretation of it is needed to assure the open-minded reader that the "existing agreements" and the "supplementary understandings" referred to in the Interpretation were those at the time effective, and necessarily such as prior thereto had been entered into. It is an unwarranted extension of Item 2 and the Mediation Board's Interpretation of it to imply that the Mediation Board at the time of rendering its Interpretation intended to impose upon the parties any agreements or understandings of the future not mutually entered into (as does this award) or to refer to future agreements at all in making its Interpretation.

Here then is imposed a new and wholly arbitrary method of forcing an unwilling party into being a party to a contract, the provision of which, a guarantee of a six-day work-week, it expressly then denied and declined. It is not the purpose of those who here dissent to argue the legal question of the Law of Contracts. Those who have interest in this case and this award will of necessity have the task of digesting the record as it stands and of measuring the worthiness or the unworthiness of conclusions and decision resting upon mis-statement of the conditions of record and imposition of unsound rules of construction of contracts and agreements which this award exhibits. Lengthy dissertation on our part on the abstract question of proper rules of construction of agreements will not aid those of competency by knowledge born of training and experience to judge of the violation of sound law of contract which this award discloses. Rather it is suggested that study and analysis of the award with its precedent positions of the parties, and of the complete record in this case, if doubt as to details of facts lingers, be made, and that such reviewers thereupon come to their own conclusions.

In all sincerity and earnestness of purpose to eliminate from the procedures and decisions of this Division unsound awards with their consequent instigation of vexatious relations between the carriers and their employes, irrespective of the immediate gainers or losers thereby, it is here affirmed that this record will disclose to the reviewers the devastatingly disturbing errors of apprehension of the record and construction of agreement which this award represents.

S/ R. F. RAY
S/ C. P. DUGAN
S/ A. H. JONES
S/ R. H. ALLISON
S/ C. C. COOK