Award No. 1525
Docket No. CL-1421

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Paul W. Richards, Referee

PARTIES TO DISPUTE:

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

ERIE RAILROAD COMPANY

STATEMENT OF CLAIM: "Claim of System Committee of Brotherhood of Railway Clerks (1) that the carrier violated Rule 30 of the Clerks' agreement when it required regularly assigned employes to lay off and thereby denied them the right to work and be paid according to their bulletined assignments on November 3, 1936; and (2) that such regularly assigned employes shall now be reimbursed for wage loss suffered as a result of such action by the carrier."

EMPLOYES' STATEMENT OF FACTS: "On General Election Day, November 3rd, 1936, the carrier denied certain regular assigned employes at 28th Street Pier 7 ER. and Inland Station, New York, the right to report for work and be paid for their regular assigned duties, other regular assigned employes in the same areas were permitted to work and be paid as per their assignments."

POSITION OF EMPLOYES: "Rules 25 and 30 of the current agreement read as follows:

"Rule 25. (a) Regularly assigned Roster 'B' platform positions will be established as follows:

"1. The months used in these calculations shall be,

1st Quarter—January, February and March

2nd Quarter—April, May and June

3rd Quarter—July, August and September

4th Quarter—October, November and December

"2. At Piers 20 and 21 (nights) on Sundays to Thursdays, inclusive, (except nights before holidays) and at Weehawken Docks (nights) on Mondays to Fridays, inclusive, (except nights before holidays) divide the number of manhours paid for during the same quarter of the preceding year by 1100 to arrive at the number of regularly established eight (8) hour positions to be worked on such nights during the current quarter. No additional operations of this character will be established, except through negotiations between the Management and the General Chairman or their representatives.

"On nights other than as above specified only such forces will be used as are needed.

'In line with previous correspondence, payment of these items closes this case.'

A copy of this letter is attached as Exhibit 'C.'

"For these reasons, we feel that this retroactive claim is unjustified by the facts and that Division Three should hold that if there was any merit to the claims as now presented, it was negotiated away."

OPINION OF BOARD: In this dispute the defense offered by carrier is that the claim is retroactive and unjustified and that, if there was any merit to the claim, it was neogtiated away. In argument carrier also urges that the claim should be denied through applying the legal rule against the dividing of a cause of action. To support its position carrier points to the following matters.

In an earlier docket, CL-748, in which the General Chairman of the Brotherhood was Petitioner, the first part of the claim was that Rule 30 had been violated by the carrier and the second part was that the regularly assigned employes who, in violation of Rule 30, were denied the right to work and be paid on November 3, 1936, should be reimbursed for wage loss suffered as a result of carrier's action. In the Employes' Statement of Facts in docket CL-748, it was alleged that on November 3, 1936, the carrier denied certain employes at five named points "and other points in the New York Terminal and Jersey City areas," the right to report for work and be paid. The hearing on docket CL-748 resulted in a deadlock and Mr. Frank M. Swacker was called in as Referee. When the dispute came before him, he became apprised that at the original hearing before the Board the General Chairman was asked if the claim involved only Croxton Transfer, Jersey City Dock (night) and one clerk at Weehawken docks, and that the General Chairman replied yes; that Inland Station and other points were eliminated and there was no claim for employes who worked and were paid for Election Day. In the award upon docket CL-748, made with the aid of Referee Swacker, being Award 783, the Opinion states: "The claim will be limited to only such regularly assigned employes as would have worked on that day at Croxton Transfer, Jersey City (night) and Weehawken but for the layoff." There was a Finding that Rule 30 was not applicable to Election Day, and accordingly in the award the claim was sustained "to extent indicated by opinion." In the instant docket, CL-1421, the first part of the claim is that Rule 30 was violated, in the same language as used in claim in docket CL-748, and the second part is that regularly assigned employes be now reimbursed for wage losses suffered as a result of such action by the carrier. In the Employes' Statement of Facts in the instant docket, CL-1421, it is averred that the carrier, on November 3, 1936, denied certain regular assigned employes at 28th Street, Pier 7 E. R., and Inland Station, New York, the right to report for work and be paid for their regular assigned duties. Thus it will be noted that as originally filed the Employes' Statement of Facts in CL-748 was to the effect that certain employes at five named points and other points in the New York Terminal and Jersey City Areas had been deprived of their rights through violation of Rule 30. The instant docket, in the Employes' Statement of Facts, mentions employes at one of those five points, i. e., Inland Station, and also at 28th Street and Pier 7, E. R., not mentioned in Docket CL-748 aside from the Statement of Facts in that docket having included "other points."

Rule 30 provided that nothing within the agreement shall be construed to permit the reduction of days for regularly assigned employes below six days per week except week in which holiday occurs by the number of such days, and with some other exceptions not here involved. The fundamental dispute in docket CL-748 was whether election day was a holiday within the exception noted in Rule 30. The Board held that the Election Day was not a holiday and that consequently the exception was not applicable. This

decision removed the question raised by carrier as to the guarantee in Rule 30 affording a ground for recovery by regularly assigned employes laid off on November 3, 1936, on account of Election Day.

It was all the time a fact that in Docket CL-748 no claim could properly have been made that the guarantee rule had been violated, had the carrier, on November 3, 1936, called for work all the regularly assigned employes. With the fact mentioned in the preceding sentence it was consistent that the Employes' Statement of Facts show a failure on part of the carrier in its duty to call those employes. That showing, of actual violation, as an element incident to the proper making of claim, would be as effective for that purpose whether one or a multitude of violations were alleged. That office or function of the Employes' Statement of Facts, as an element of making claim, is self-evident. But carrier's aforementioned defensive averments would imply that the Employes' Statement of Facts, usually following the statement of the claim itself, has a far more exacting office or function, namely, the designating of every point where employes have suffered loss of pay through carrier's violation of the rule. That is, carrier says the instant claim is retroactive, and is retroactive because in the dispute in Docket CL-748 the General Chairman, after alleging in the Employes' Statement of Facts that employes at five and other points had been deprived of their rights, at the heaaring before the Board did these things: (1) he answered affirmatively the question whether the claim involved only Croxton Transfer, Jersey City Dock (night) and one clerk at Weehawken docks; and (2) stated that Inland Station and "other points" were eliminated; and (3) after Award 783 was made, closed the case after the employes at the three points named in the Award had been compensated. Seemingly the carrier's point is that any recession by the Chairman from the inclusiveness found in the Employes' Statement of Facts in docket CL-748 extinguished to that extent the rights of employes.

Some might say that, had the Chairman been asserting a claim that was his own personal property, his doing of (1), (2), and (3) above, might be interpreted as an intended relinquishment by him of his own compensation for wrongs he might have suffered at Inland Station and other points. But there is a vital distinction between what is assumed in the preceding sentence, and what were the verities. That is, neither the Board nor the carrier could but have known that they were treating with one acting in a **purely representative** capacity **for others,** and that the "others" were **all** the employes whose rights had been violated. Having that knowledge, the carrier was faced with two alternatives, first, to accept (1), (2), and (3) above as a representative's "negotiating away" as carrier puts it, in such off-hand manner, of the money rights of others he owed the duty to protect, or second, to consider whether there was not some more reasonable and expectable intendment to be ascribed to what the Chairman said and did.

The carrier has seen fit to choose the first alternative, but, in the opinion of the Board, the carrier thereby erroneously gives the Chairman's doings an intent and effect they did not fairly exhibit, as it would appear from the following considerations.

The Chairman's remarks were made at the original hearing. The dominant question there was the meaning of the exception to Rule 30. Palpably however, decision of that question would have been moot without any showing of violation of the rule in its meaning as contended for by employes. So, at this original hearing there was concededly a discussion of the showing of violation. According to employes' statement in argument, and it so seems, the carrier was making objections to the showing. From the whole record we think it a safe assumption that following these objections the Chairman's statements were his concession and amounted to no more and no less than saying that the points where he had a showing of violation were three points, Croxton Transfer, Jersey City Dock (night) and one clerk at Weehawken. This relatedness of events and circumstances, just mentioned, is significant.

It points to but one reasonable conclusion, namely, what the Chairman said had to do solely with the factual matters contained in the Employes' Statement of Facts that followed in the docket the statement of the claim itself, and can not be tortured into a statement or agreement that concerned or had any reference to the second part of the claim itself, "that such regularly assigned employes shall now be reimbursed for wage loss suffered as a result of such action by the carrier."

Without attempting to decide whether authority was in the Chairman to bar, at will, the rights to pay of employes who never had a bearing, we are of the opinion that it was a wholly unreasonable concept that he was, by what he did, exhibiting any intent to do so.

In Award 783 we find no indication that the Board was conscious that it was taking away from all other employes their rights to their pay under the rule, and in the opinion of the Board, the injecting of such intendment would be inconsistent with the purposes for which this Board has existence, and would run counter to its practices. We are of the further opinion that the invoking of the legal rule against dividing a cause of action is without merit. The defensive averments made in this docket do not, in the opinion of the Board, relieve it from its liability for violation of Rule 30.

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 carrier violated Rule 30 and as a result the claimants are entitled to be compensated for their loss of pay.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 25th day of July, 1941.