Award No. 1614
Docket No. CL-1679

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Sidney St. F. Thaxter, Referee

PARTIES TO DISPUTE:

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

GULF COAST LINES
INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY
SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY
SUGARLAND RAILWAY COMPANY
ASHERTON & GULF RAILWAY COMPANY
(Guy A. Thompson, Trustee)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

"(a) The carrier is violating the Clerk's agreement by refusing to reduce all 365 day annual assignments in the Houston, Texas Freight Warehouse to 306 day annual assignments. And

"(b) Claim that the rates of pay for all 365 day assigned positions be increased, retroactive to November 1, 1940, so that the earnings of the positions will be the same for a 306 day assignment as they were for a 365 day assignment. Also

"(c) Claim that the employes be paid an additional day's pay at the rate of time and one-half for each Sunday and holiday worked from November 1, 1940 until correct assignments and rates of pay are made effective."

There is in evidence an agreement between the parties bearing effective date of November 1, 1940.

EMPLOYES' STATEMENT OF FACTS: "The following positions in the Houston warehouse are assigned to work 365 days annually:

Warehouse Foreman
Check Clerk
Loading Clerk
Seal and Exception Clerk
Breakouts (2)
Stevedores (2)
Truckers (6)

"The Houston Freight Warehouse is not open to the public on Sundays and holidays, and freight is not received nor delivered.

date as coming under all the rules of the Agreement with exception of the promotion, displacement, assignment and hours of service rules. On November 1, 1940, the Carrier agreed that positions listed under Section (c), of Rule 7, and marked with an asterisk were excepted from the following rules as contained in that schedule:

'Rule 37. Day's Work and Overtime

'(a) Except as otherwise provided in this rule, eight (8) consecutive hours or less, exclusive of the meal period shall constitute a day's work for which eight (8) hours pay will be allowed. Time in excess of that on any day will be considered as overtime and paid on the minute basis at the rate of time and one-half.

'(b) Hourly rated employes who report for work will be paid a minimum of four (4) hours pay at pro rata rates. If held on duty more than four (4) hours after starting time eight (8) hours pay shall be allowed. This paragraph shall not operate to reduce the number of full time positions now in existence.'

'Rule 43. Notified or Called

'(a) Except as provided in Paragraph (b) of this rule, employes notified or called to perform work not continuous with, before or after the regular work period, or on Sundays and specified holidays, shall be allowed a minimum of three (3) hours for two (2) hours work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on a minute basis.

'(b) Employes who are called regularly on Sundays and specified holidays shall be allowed a minimum of eight (8) hours at time and one-half rate, except as provided in Rule 47.'

"Should the Warehouse Foreman be reassigned on a 306 day basis under the above quoted rules, when called to work on Sundays or holidays or work in excess of 8 hours per day, he would not be entitled to any additional allowance.

"It is the contention of the Carrier that the duties performed by the positions involved in this case are of such nature that it is necessary for the same to remain assigned so as to include Sundays and holidays and it is the further contention of the Carrier that your Honorable Board should dismiss this case for lack of jurisdiction inasmuch as the determination of positions assigned to Sunday and holiday work necessary to the continuous operation of the Carrier is a subject for negotiation between the parties by agreement."

OPINION OF BOARD: This case involves the application of Rule 47 of an agreement effective November 1, 1940 which the System Committee claims has been supplemented by a letter dated October 13, 1940. The rule and the letter read as follows:

"Rule 47. Sunday and Holiday Work

"(a) Work performed on Sundays and the following legal holidays; namely, New Year's Day, Washington's Birthday, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas (provided when any of the above holidays fall on Sunday, the day observed by the State, Nation or by proclamation shall be considered the holiday) shall be paid for at the rate of time and one-half, except that employes regularly assigned to work full time on Sundays and the seven designated holidays, and men called to fill their places on such regular assignment, will be compensated at the pro rata rate of the position."

"Houston, Texas
October 13, 1940

Mr. J. L. Dyer, Gen. Chairman
B. of R. C., Houston, Texas

Dear Sir:

With reference to agreement regarding the 365 day assigned positions not necessary to the continuous operation of the carrier.

It is agreed that all 365 day assignments, not necessary to the continuous operation of the carrier, will be reduced to 306 day assignment and the daily rate will be adjusted so that the earnings will be the same as received for 365 days.

This understanding shall remain in effect until changed in accordance with the terminating rule of the agreement.

Yours truly,

/s/ W. G. Choate
General Manager

Accepted:
/s/ J. L. Dyer
Gen. Chairman, B. of R. C."

In connection with the status and the interpretation of the letter of October 13, Rule 71 (a) of the agreement is likewise significant. This reads as follows:

"Rule 71. Date Effective and Change

"(a) This agreement shall be effective November 1, 1940, superseding all other rules, agreements and understandings prior to October 13, 1940, in conflict herewith, and shall continue in effect one year, and thereafter until it is changed as provided herein or under provisions of the Railway Labor Act."

The record in considerable detail discloses the negotiations which led up to the adoption of the rules in the agreement of November 1st, and calls attention to various controversies which had taken place over a period of years between the carrier and the employes. These do not appear to us to be of consequence unless they explain one of the present rules which is on its face ambiguous.

There is no good reason why the parties may not modify the agreement by a writing which is not actually incorporated within it. The first question to be decided here is whether they have done so. The letter which the Committee claims is a part of the agreement is dated October 13th. It is evident that it refers to an understanding between the parties on a subject not a part of the formal agreement, viz: the status of "365 day assigned positions not necessary to the continuous operation of the carrier." It is significant that the formal agreement supersedes, as shown by Rule 71, only "rules, agreements and understandings prior to October 13, 1940." Why was the date of October 13 fixed upon? Is it unreasonable to suggest that the parties who signed the agreement had in mind this very letter? And does not the letter itself refer to the agreement when it says, "This understanding shall remain in effect until changed in accordance with the terminating rule of the agreement." To what agreement did they refer except to the agreement which was to become effective November 1st? It seems to us clear, not only that the signers of the letter had in mind this agreement, but that the agreement itself in Rule 71 impliedly recognized the understanding set out in the letter. But beyond all this we have an acknowledgment by the parties of the binding effect of the letter. In a letter of Mr. Choate, the General Manager of the Carrier, dated December 5, 1940, the letter of October 13th is referred to as "the letter agreement." Furthermore, numerous

conferences were held between the parties to determine what positions did and did not come within the classification "necessary to the continuous operation of the carrier."

The carrier, nevertheless, contends that the intent of the letter of October 13th was not to establish a binding agreement but was rather an expression of a willingness to reduce 365 day assignments to 306 day assignments in those cases where the carrier could see its way clear to do so without detriment to the service. The carrier says that it was not the intention "to include all the positions where compensation was figured on the 365 day basis and which the carrier considers necessary to work Sundays and holidays * * *." If, as is claimed, the decision was to be left solely with the carrier as to which assignments would be reduced, what, it may be asked, is the meaning of the first three words of the second paragraph of the letter, "It is agreed"? The very fact that negotiations took place between the carrier and representatives of the employes to determine what positions came within the classification, "Not necessary to the continuous operation of the carrier," is cited by the carrier as evidence that there was to be no binding understanding until the parties had agreed with respect to the positions. We do not place such a construction on the negotiations. On the contrary we regard them as a recognition that there was a binding obligation to reduce all 365 day assignments not necessary to the continuous operation of the carrier to 306 day assignments. The fact is that both parties knew that there were many borderline cases, and it is evident that the negotiations were merely for the purpose of determining what assignments came within the classification which had been agreed upon. Likewise we must not attach too much weight to tentative compromise proposals, where in efforts to reach an agreement classifications may have been suggested inconsistent with present claims.

In spite of all the evidence which seems to us conclusive, the carrier says that the letter of October 13th does not refer to the agreement at all but to the so-called Robstown case. The Robstown case, which was settled over a year and a half before the new agreement became effective, concerned a clerk whose assignment during certain of the depression years had been reduced from 365 days to 306 days with a proportionate loss in pay, and it was agreed to restore the 365 day assignment with certain of the back pay made up to him. The case had nothing whatever to do with the reduction of a 365 day assignment "not necessary to the continuous operation of the carrier" to a 306 day assignment.

We might at this point refer to one other contention of the carrier. It is claimed that the re-assignments contemplated by the letter apply only to daily rated positions. To support this claim the carrier calls attention to the second paragraph of the letter of October 13th which says in part "the daily rate will be adjusted so that the earnings will be the same as received for 365 days." We do not attach to this wording the significance suggested by the carrier. The meaning is simply that the same pay will be received for 306 days work as had been received for 365. That this is so is made clear when we glance at the first line of this paragraph which shows that this agreement applies to "all 365 day assignments." In our opinion it makes no difference that the pay is based on an hourly, a daily, a weekly, or a monthly rate. It is important in this connection to point out that the carrier made no such distinction when the parties in their conferences were endeavoring to agree as to what positions were not necessary to the continuous operation of the carrier. In fact the parties were at those times in accord that some positions not on a daily basis with respect to pay were entitled to the 306 day assignment. See Exhibit C-1 and R-14.

The carrier also calls attention to the fact that the position of Warehouse Foreman, one of those here involved, is excepted from the rules relating to Overtime (37), and Call (43). It is argued that such exceptions bar the claim which he presents here. We agree, however, with the contention of the

Committee that these exceptions are not inconsistent with his being subject to the provisions of Rule 47, as supplemented by the letter of October 13th.

We hold that the letter of October 13th, 1940 is a part of the agreement effective November 1, 1940, and that it required the carrier as of November 1st to reduce all 365 day assignments not necessary to the continuous operation of the carrier to 306 day assignments without a reduction in the total pay received by the employes affected.

The letter must be read as a supplement to Rule 47. The next question before us is as to the meaning of the phrase "not necessary to the continuous operation of the carrier." This language has been construed in three Arbitration Awards, GC-308, GC-309 and GC-700. Each of these cases holds that the language must be strictly construed, and that the mere fact that the work which an employe is called on to perform may be required for effective operation or may be necessary to meet competition from other carriers is not enough. The question really is what work is necessary to meet the public demand for actual transportation on Sundays and holidays, or, in other words, what work is necessary for the continuous operation of trains. In GC-309 the work of men employed in loading and unloading freight on docks owned by the railroad was held not necessary to the continuous operation of the carrier as that language was used in the rules there in question, and this ruling was made in spite of the fact that the Arbitrators conceded that "effective management may make necessary the prompt loading and unloading of freight from one carrier to another." The other two cases are to the same general effect. Whatever else may be said for this interpretation of the language in question, we agree with the views of the Arbitrators in GC-700 that any other construction "would nullify the rules and leave it practically within the power of the management to apply the exception whenever it might see fit to do so." We likewise concur in what is said that if rules are to mean anything there must be consistency in the application of them. In the case now before us the parties used language which on three separate occasions had been construed in the same way, and we must hold that their use of it was made in the light of these interpretations.

In view of these precedents we must hold that all 365 day assignments in the Houston Freight Office, referred to in the claim of the System Committee including that of Warehouse Foreman, should have been reduced, effective November 1, 1940, to 306 day annual assignments without any reduction in the earnings of the men employed in such positions.

Under the provisions of Rule 47 as modified by the letter of October 13, 1940 the carrier has the right to assign men regularly to this work on Sundays and holidays, even though it is not necessary for continuous operation of the carrier. The only obligation on the carrier is, if the men are so regularly assigned, to compensate them for the additional time at the "pro rata rate of the position." We do not feel that the employes here involved are entitled to time and one-half for Sunday and holiday work. In spite of the fact that the carrier violated the agreement in not reducing their assignments to the 306 day annual basis, they were regularly assigned within the meaning of the rule to work on Sundays and holidays and are entitled only to the pro rata rate.

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 agreement of October 13, 1940 is supplemental to the current agreement; that it has the same effective date, viz., November 1, 1940 and applies to all the positions involved in this dispute, they having 365 day assignments and not being "necessary to the continuous operation of the carrier."

AWARD

Claim (a) sustained; claim (b) sustained; claim (c) sustained to this extent—that each employe be paid an additional day's pay at the pro rata rate established under claim (b) for each Sunday and holiday worked from November 1, 1940 until a correct assignment in his case shall have been made effective, less amounts actually received for regularly assigned working hours on such days.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 27th day of November, 1941.