Award No. 2224
Docket No. DC-2192

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Fred L. Fox, Referee

PARTIES TO DISPUTE:

JOINT COUNCIL DINING CAR EMPLOYES

ILLINOIS CENTRAL RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the Joint Council Dining Car Employes Local 351, Hotel and Restaurant Employes' International Alliance, for and in behalf of Walter Washington, and other employes similarly situated for retroactive compensation from March 1, 1941, to September 1, 1941; for all deductions made from wages for board and lodging furnished while in service, and for lodging at away from home terminals, in accordance with Article 27 of the current Agreement.

EMPLOYES' STATEMENT OF FACTS: There is in evidence an Agreement effective November 16, 1937 as to rates of pay and December 1, 1937 as to rules between this Carrier and our International Union governing certain classes of Dining Car Employes. Rule 27 of that agreement provides—

"ARTICLE 27

Meals and Sleeping Accommodations

Employes will be furnished meals when on duty in dining Cars. Employes will be furnished sleeping accommodation while enroute in service, or while deadheading by order of the company, when such accommodation are available in railroad owned equipment on the trains. They will also be furnished sleeping accommodations at their away from home terminals."

Under date of February 14, 1941, the Administrator Wage and Hour Division, United States Department of Labor acting under the authority of the Fair Labor Standards Act, issued a wage order from which we quote in part.

"Pact 591—Minimum Wage Rates
In The Railroad Carrier Industry

Sec. 591.2 Wage Rates.

(a) Wages at a rate of not less than 36 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employes in the Trunk Lines Division of the Railroad Carrier Industry who is engaged in Commerce or in the production of goods for Commerce.

Section 591.5 Effective Date.

This Wage Order shall become effective March 1, 1941."

2. Claim is barred because it was not handled procedurally as required by agreement.

3. The contract provisions of the agreement as supplanted by the provisions of the Fair Labor Standards Act have been fully complied with.

4. Since "tips" are "wages," carrier is entitled literally and lawfully to recover wages in excess of amounts prescribed by agreement.

The carrier has endeavored to get the organization to take steps to agree on a joint statement of facts in accordance with procedure outlined in the Board's requirements contained in Circular No. 1 issued October 10, 1934, without success, and reserves the right to submit evidence in rebuttal of any alleged facts, contentions and/or allegations made by the employes in their ex parte submission, or to any other submission the employes may make to your Board about this dispute.

OPINION OF BOARD: Prior to the passage by the Congress of the "Fair Labor Standards Act of 1938," there were in existence two agreements between the parties to this dispute: one, effective November 16, 1937, relating to rates of pay; and the other, effective December 1, 1937, covering rules and working conditions. Under the first agreement, rates of pay for waiters began at 25 cents per hour, and increased according to service, so that such employes with six years or more of services were paid 31¼ cents per hour. Under the second agreement such employes were, under certain conditions, furnished board and lodging, as evidenced by Article 27 of that agreement, which reads:

"Meals and Sleeping Accommodations.

"Employes will be furnished meals when on duty in dining cars. Employes will be furnished sleeping accommodations while enroute in service, or while deadheading by order of the company, when such accommodations are available in railroad owned equipment on the trains. They will also be furnished sleeping accommodations at their away from home terminals."

Section 4 of the "Fair Labor Standards Act of 1938" created a Wage and Hours Division in the Department of Labor, and Section 8 of the Act empowers the Administrator of the Wage and Hours Division, after investigation and notice, to fix the minimum rate or rates of wages to be paid under Section 6 of the Act, that being the section which fixed the minimum wage rate, beginning at 25 cents per hour, and increasing in the course of years to 40 cents per hour. Proceeding under this power, the Administrator, by an order dated February 14, 1941, effective March 1 of the same year, fixed the minimum wage rate of pay at 36 cents per hour, as will appear from the Order which we quote:

"(a) Wages at a rate of not less than 36 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employes in the Trunk Lines Division of the Railroad Carrier Industry who is engaged in Commerce or in the production of goods for Commerce."

Section 3 of the Fair Labor Standards Act defines certain words and terms used in the Act, and Sub-section (m) reads as follows:

"'Wage' paid to any employe includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employe with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employes."

Up to the date when the increase of wages to 36 cents per hour became effective, any deduction for the cost of board, lodging and other facilities furnished employes, would have reduced the cost rate of pay below that fixed by the agreement; but when the 36 cents per hour rate was established, it became possible to make such deduction, and still leave a cash wage equal to or above the rate provided for in the agreement. Then it was that the Carrier began to make the deductions complained of in this claim. It may be that as to bus boys, whose hourly wage under the agreement was 12½ cents per hour, and whose wage was increased by the Act to 25 cents per hour, the deduction was made at an earlier date.

The contention of the employes is that the Fair Labor Standards Act did not change the agreements between the parties, except as to the minimum wage standards; and, especially did not, in any way, affect Article 27 of the agreement effective December 1, 1937. To support this theory, they quote from Interpretative Bulletin No. 8, issued by the Administrator of the Wage and Hours Division, in which he says:

> "Those provisions therefore, in a collective agreement which set standards that do not meet the provisions set in the Act will yield to the provisions of the Act. This does not mean that the Act destroys such collective agreements. There is nothing in the Act itself which purports to relieve an employer or his employes of any obligations he or they may have assumed by contract."

Petitioner's claim covers the six months from March 1 to September 1, 1941. It was initially filed with the Carrier on April 23, 1942, and formally filed with this Division on October 26, 1942. The Carrier contends that we have no jurisdiction to hear the claim and cites Rule 24, negotiated and agreed to through mediation proceedings, under Section 5, Second, of the Railway Labor Act. This rule reads:

> "Any claim or grievance that may arise shall be presented by the employe aggrieved or by his representative to the Superintendent Dining Service within 20 days from its occurrence. A claim or grievance not presented within 20 days will not be allowed or recognized by either the railroad or the employes' representative."

It is also contended by the Carrier that what we are asked to do is to pass on provisions of the Fair Labor Standards Act, and that we are without jurisdiction to do so. We dispose of this contention by saying that, as we see it, the claim is filed under the agreements, and petitioner's rights must be determined thereunder as they stood from March to September, 1941, and as they may have been superseded or modified by the Fair Labor Standards Act. The fact that, to this extent, we may pass upon provisions of the Act, as incidental to what the contracts mean, as modified, does not, in our opinion, deprive us of jurisdiction to hear the dispute.

The other contention of the Carrier presents a more serious question. The petitioner seeks to meet it by calling our attention to the fact that shortly after the Fair Labor Standards Act went into effect, the Carriers began to make the deductions claimed to be justified under Section 3 (m) of the Act. It was then that the employes' organization brought the matter to the attention of the Administrator of the Wage and Hours Division, and asked for a ruling. This was done by petitioner in April, 1941, whether within 20 days from March 1, 1941, does not appear. We think the request for a ruling may be construed to cover two questions: (1) the right to make any deduction, and (2) if allowable under the Act, the amount thereof. As we understand this request for a ruling was made under the provisions of Sub-sections (a) and (b) of Section 8 of the Fair Labor Standards Act, and a quotation of these sections is necessary to show the powers of the Administrator thereunder:

"(a) With a view to carrying out the policy of this Act by reaching, as rapidly as is economically feasible without substantially curtailing employment, the objective of a universal minimum wage of 40 cents an hour in each industry engaged in commerce or in the production of goods for commerce, the Administrator shall from time to time convene the industry committee for each such industry, and the industry committee shall from time to time recommend the minimum rate or rates of wages to be paid under section 6 by employers engaged in commerce or in the production of goods for commerce in such industry or classifications therein.

"(b) Upon the convening of an industry committee, the Administrator shall refer to it the question of the minimum wage rate or rates to be fixed for such industry. The industry committee shall investigate conditions in the industry and the committee, or any authorized subcommittee thereof, may hear such witnesses and receive such evidence as may be necessary or appropriate to enable the committee to perform its duties and functions under this Act. The committee shall recommend to the Administrator the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry."

The investigation and ruling requested was delayed, but seems to have been contemplated for September, 1941, but was not then or thereafter conducted or made. Just when it was abandoned does not clearly appear, but the reason therefor appears from a letter written by an official of the Department of Labor to an employe representative, dated March 9, 1943, in which the official said:

"The investigation in this matter was initiated at a time when the wages of dining car employes were considerably lower than they are at present. At that time, it was possible that the wages of many dining car employes were reduced below the minimum required by the Act as a result of the deductions. Subsequently railroad employes received increases in wages, and it became apparent that the profit on deductions for meals would not reduce their wages below the applicable minimum wage. As a result of this wage increase it appeared that no purpose would be served by continuing the investigation and holding a hearing, and no further action was therefore taken."

The investigation before the Wage and Hours Division proving abortive, the petitioner then presented the matter to the Carrier on April 23, 1942, and to this Division on October 26, 1942. It will be noted that his claim then made, and now prosecuted, is based, not under the Fair Labor Standards Act, but on Article 27 of the agreement under which he was working. The claim, or rather a request for a ruling made to the Wage and Hours Administrator, was, necessarily, under the Fair Labor Standards Act, as that Act did not give the Administrator power to pass on anything not within the purview of the Act; and that power certainly did not extend to the interpretation of agreements. On the other hand, this Board has no power to pass on the provisions of the Fair Labor Standards Act, as such. This is held by many Awards, and seems to be conceded. Therefore, the petitioner, in March, 1941, having two separate and distinct lines of action available, had the option of making his complaint, either under his agreements with the Carrier, or under the terms of the Fair Labor Standards Act. If he elected to proceed under the contract, Rule 24 required that he make his claim within 20 days, and he was limited, as to remedy, to the Carrier and this Board. If he elected to rely on the Act, he was not limited as to time, but could only file his claim with the Administrator of the Wage and Hours Division. He elected to pursue the latter course, and developments were such as to bar any answer to his request for a ruling. Then, and not until then, did he pursue his remedy under his contract with the Carrier, and when he made up his mind to do so, it was, in our opinion, too late.

Agreements must be treated, construed and applied as a whole. Parties thereto cannot claim the benefit of one provision of a contract, without assuming the burdensome effect of some other provision of the same or related agreement. When petitioner asked that Article 27 of the agreement be construed to his advantage, the Carrier had the right to ask that Rule 24 of the Mediation Agreement be applied in its favor. There would seem to be no escape from this conclusion. We do not think the prosecution of the inquiry before the Administrator of the Wage and Hours Division can be construed as amounting to the filing of a claim upon a grievance under Rule 24. We, therefore, hold that the petitioner is barred of relief, by reason of lack of authority of the Board to decide the claim, because the same was filed with the Carrier more than twenty days after the same occurred, and more than twenty days after the date his claim ended. We think his claim, if filed with the Carrier before September 1, 1941, would have related back as much as twenty days, but the claim being first filed with the Carrier on April 23, 1942, that question does not here arise.

Our conclusion makes unnecessary any discussion of the interesting question of whether former Awards of this Board on the primary question at issue should be reconsidered and revised.

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 employe involved in this dispute are respectively carrier and employe 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 Board is without authority to decide petitioner's claim, because the claim was not filed with the carrier within twenty days after the same occurred.

AWARD

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: H. A. Johnson
Secretary

Dated at Chicago, Illinois, this 29th day of June, 1943.